

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

EQUAL EMPLOYMENT )  
OPPORTUNITY COMMISSION, )

Plaintiff, )

v. )

2:11-cv-00320-JAW

KOHL'S DEPARTMENT STORES, )  
INC., )

Defendant. )

**ORDER ON THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

In this employment discrimination action, the Equal Employment Opportunity Commission (EEOC) claims that Kohl's Department Stores, Inc. (Kohl's) failed to accommodate a former employee's disability and constructively discharged her. Having carefully considered the much-disputed record, the Court concludes that under Federal Rule of Civil Procedure 56 there are no genuine disputes of material fact that require jury resolution, and grants Kohl's motion for summary judgment.

**I. STATEMENT OF FACTS**

**A. Procedural History**

On August 23, 2011, the EEOC filed a complaint against Kohl's, alleging that Kohl's had unlawfully discriminated against Pamela Manning, a former Kohl's employee, by failing to accommodate her disability and constructively terminating her employment. *Compl.* (ECF No. 1). On October 21, 2011, Kohl's answered the

Complaint, denying its essential allegations and asserting several affirmative defenses. *Def.'s Ans. to Compl.* (ECF No. 5) (*Ans.*). On December 3, 2012, Kohl's filed a motion for summary judgment with a supporting statement of material facts. *Def. Kohl's Dep't Stores, Inc.'s Mot. for Summ. J.* (ECF No. 71) (*Def.'s Mot.*); *Def.'s Statement of Material Facts* (ECF No. 72) (DSMF). On January 22, 2013, the EEOC responded to Kohl's motion and its statement of material facts, and filed a statement of additional facts. *Pl. EEOC's Mem. of Law in Opp'n to Def.'s Mot. for Summ. J.* (ECF No. 77) (*Pl.'s Opp'n*); *Pl. EEOC's Local Rule 56.1 Opposing Statement of Material Facts* (ECF No. 78) (PRDSMF); *Pl. EEOC's Additional Statement of Material Facts* (ECF No. 79) (PSAMF). On February 25, 2013, Kohl's filed a reply to the EEOC's response and to the EEOC's statement of additional material facts. *Reply to Pl.'s Opp'n to Def. Kohl's Dep't Stores, Inc.'s Mot. for Summ. J.* (ECF No. 105) (*Def.'s Reply*); *Def. Kohl's Dep't Stores, Inc.'s Reply to EEOC's Additional Statement of Material Facts* (ECF No. 106) (DRPSAMF).

## **B. Factual Background<sup>1</sup>**

### **1. The Kohl's Store in Westbrook, Maine**

During the period relevant to this lawsuit, Tricia Carr was the Store Manager for Kohl's store in Westbrook, Maine (the Westbrook Kohl's), Michelle Barnes, the Assistant Store Manager for Apparel and Accessories at the Westbrook Kohl's, Ryan Austin Pease, the Administrative Assistant at the Westbrook Kohl's,

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<sup>1</sup> In accordance with "the conventional summary judgment praxis," the Court recounts the facts in the light most hospitable to the EEOC's case theories consistent with record support. *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 17 (1st Cir. 2002). In compliance with this obligation, the Court recites supported facts as true even if Kohl's disputes them.

Maureen Gamache, a District Manager for Kohl's, and Michael Treichler, a Territory Human Resource Manager for Kohl's. DSMF ¶ 1; PRDSMF ¶ 1. Ms. Carr is familiar with diabetes because her mother and uncle have diabetes and are insulin-dependent.<sup>2</sup> DSMF ¶ 2; PRDSMF ¶ 2. Maureen Gamache is a diabetic; she has Type 2 diabetes and controls her medical condition with diet and exercise.<sup>3</sup> DSMF ¶ 3; PRDSMF ¶ 3. Michael Treichler's mother has diabetes and is insulin-dependent.<sup>4</sup> DSMF ¶ 4; PRDSMF ¶ 4.

During the relevant period, the Westbrook Kohl's had four salaried executives: the Store Manager; the Assistant Store Manager of Children's, Footwear and Home; the Assistant Store Manager of Human Resources/Operations; and the Assistant Store Manager for Apparel and Accessories. DSMF ¶ 5; PRDSMF ¶ 5. The Westbrook Kohl's had approximately 125 hourly associates. *Id.* Only thirteen of the 125 hourly associates had the status of "full-time associates": (A) Area Supervisor Children's, Footwear & Home; (B) Home Sales Supervisor; (C) Kids

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<sup>2</sup> Kohl's paragraph two stated: "Carr is familiar with diabetes because her mother and uncle have Type I diabetes and are insulin-dependent." DSMF ¶ 2. EEOC interposed a qualified response on the ground that Ms. Carr testified that her mother and uncle have Stage II, not Type I diabetes. PRDSMF ¶ 2. The Court reviewed Kohl's deposition citation to Ms. Carr's testimony and agrees with EEOC that Ms. Carr used the term Stage II, not Type I. The Court eliminated the descriptive phrase from Kohl's paragraph two and used "diabetes" without an adjective. EEOC also denied paragraph two "to the extent fact implies Carr's familiarity with diabetes means she does not have to comply with ADA requirement of performing an individualized assessment of an employee's condition." *Id.* As this statement of fact does not create any such implication, the Court deems the paragraph as altered admitted.

<sup>3</sup> EEOC admitted the paragraph but denied any implication that Ms. Gamache's diabetes means that she does not have to comply with ADA requirement of performing an individualized assessment of an employee's condition. PRDSMF ¶ 3. As this statement of fact does not create any such implication, the Court deems the paragraph admitted.

<sup>4</sup> Kohl's paragraph four stated that Mr. Treichler's mother has Type I diabetes. DSMF ¶ 4. EEOC qualified its response to paragraph four on the ground that Mr. Treichler testified only that his mother was diabetic and insulin-dependent and did not describe the type of her diabetes. PRDSMF ¶ 4. The Court reviewed Kohl's deposition citation and agrees with the EEOC that Mr. Treichler did not describe his mother's type of diabetes. The Court eliminated the descriptive phrase from Kohl's paragraph four and used "diabetes" without an adjective.

Sales Supervisor; (D) Shoes Sales Specialist; (E) Area Supervisor Apparel & Accessories; (F) Misses Sales Supervisor; (G) Men's Sales Supervisor; (H) Jewelry Sales Specialist; (I) Beauty Sales Specialist; (J) Area Supervisor Customer Service; (K) Area Supervisor Operations; and (L) Visual Supervisor. *Id.* The Administrative Assistant at the Westbrook Kohl's also works full-time, although that position is ordinarily a part-time position. *Id.* Out of these thirteen "full-time associates," eleven were considered full-time sales associates; the Visual Supervisor and the Administrative Assistant do not service customers on the sales floor. DSMF ¶ 6; PRDSMF ¶ 6. The number of full-time associates allowed at a Kohl's store is based on the store's sales volume, as determined by Kohl's Office of Store Administration and Store Finance. DSMF ¶ 7; PRDSMF ¶ 7. The majority of sales associates scheduled to work at Kohl's stores on each shift are part-time sales associates.<sup>5</sup> DSMF ¶ 10; PRDSMF ¶ 10.

Full-time sales associates at Kohl's are supervisors or lead persons within the store.<sup>6</sup> DSMF ¶ 8; PRDSMF ¶ 8. The job responsibilities of full-time sales

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<sup>5</sup> Kohl's paragraph 10 also included the following statements, which the EEOC denied: "Full-time sales associates are responsible for supervising and directing the work of all part-time sales associates in the store, not just the associates in the specific departments that they are assigned to on a given day. Because of their supervisory responsibility, full-time sales associates are scheduled to work on all of the shifts to direct the work of the part-time sales associates. [ ] All full-time sales associates work a variety of shifts, including early morning, midday, evening, and overnight shifts." DSMF ¶ 10; PRDSMF ¶ 10. The record supports the denial of these statements. More specifically, the EEOC's record citation creates a genuine dispute of material fact as to whether "all" full-time associates supervise the work of "all" part-time associates, and whether "[a]ll full-time sales associates work a variety of shifts." See PRDSMF Attach 2 *Dep. Tr. of Pamela Manning* at 68:11-69:08, 73:13-73:15 (ECF No. 78-2) (*Manning Dep.*); *infra* notes 7, 10. The Court omits these statements from paragraph 10

<sup>6</sup> The EEOC interposed a qualified response to paragraph 8, "deny[ing] that all full-time sales associates are Supervisors." PRDSMF ¶ 8. The Court rejects the EEOC's denial and deems this sentence of paragraph 8 admitted because the "or" in the sentence means that a full-time associate could be a "lead person" and not a "supervisor."

associates<sup>7</sup> include ensuring that (A) the fitting rooms are monitored, merchandise is recovered from the fitting room and sales floor and returned to its proper place, (B) there is additional coverage on the cash registers when there are lines of customers, (C) customer questions and returns are handled appropriately, and (D) the communication books—store set-up requirements—are completed in a timely manner.<sup>8</sup> *Id.* Full-time associates also process returns to vendors—locating the merchandise that is to be returned and processing the returns through a computer—and conduct price changes on merchandise.<sup>9</sup> *Id.* Some of the full-time sales associates are considered supervisors because they lead and direct the work of

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<sup>7</sup> The EEOC’s qualified response to paragraph 8 denied that “only full-time associates performed the duties identified in this paragraph.” PRDSMF ¶ 8. After reviewing the deposition citation and viewing the facts in the light most favorable to the non-moving party, the Court agrees with the EEOC that the record supports its assertion that part-time associates performed some duties identified in paragraph 8. *See Manning Dep.* at 68:11-69:08, 73:13-73:15. The Court has modified paragraph 8 to reflect the fact that full-time associates were engaged in the enumerated job responsibilities but these responsibilities may not have been held exclusively by full-time associates.

Similarly, the EEOC denied Kohl’s paragraph 17, which stated: “A part-time sales associate cannot perform a full-time sales associate’s job because a part-time sales associate typically does not have the same knowledge, training, experience, or decision-making authority as a full-time sales associate.” PRDSMF ¶ 17. The EEOC argued that some part-time associates are themselves supervisors, and that after Ms. Manning herself left Kohl’s—where she had been a full-time sales associate—her duties in the Beauty Department were assigned to part-time sales associates. *Id.* Viewing the record in the light most favorable to the EEOC, the Court agrees that there is a genuine dispute of material fact over whether the general statement “a part-time sales associate cannot perform a full-time sales associate’s job” accurately conveys the distribution of job responsibilities at Kohl’s. The Court declines to include Kohl’s paragraph 17.

<sup>8</sup> Kohl’s paragraph 8 also stated that full-time sales associates are responsible for ensuring that “rest breaks are taken,” and that full-time associates lead “teams of part-time associates” in conducting price changes on merchandise. DSMF ¶ 8. The EEOC denied these statements, supporting their position by arguing that, as a full-time associate, Ms. Manning herself did not decide when part-time associates took rest breaks, and that while Ms. Manning did conduct price changes during her full-time employment, she did not lead teams of part-time associates in doing so. PRDSMF ¶ 8. The Court accepts these qualifications as supported by the record citation and rephrases paragraph 8 accordingly. *See Manning Dep.* at 82:15-83:18, 84:24-85:10, 172:22-173:09. The Court deems the paragraph as altered admitted.

<sup>9</sup> The Court modified this sentence of paragraph 8 to remove the implication that only full-time associates engaged in these job responsibilities. *See supra* note 7.

part-time sales associates and the flow of work in each department in the store.<sup>10</sup> DSMF ¶ 9; PRDSMF ¶ 9. These associates may coach part-time sales associates on Kohl's policy and procedures but do not have the authority to hire, discipline, or discharge the part-time sales associates whom they supervise. *Id.*

All full-time associates are guaranteed between 36 and 40 hours of work per week; part-time associates are not guaranteed a minimum number of hours per week.<sup>11</sup> DSMF ¶ 11; PSAMF ¶ 1. In addition to being guaranteed 36-40 hours per week, full-time associates are entitled to receive benefits which include, without limitation, medical coverage, life insurance, paid sick leave, paid vacation, paid holidays, paid personal days, jury duty pay, bereavement pay, merchandise discounts, and 401(k) plans. DSMF ¶ 12; PRDSMF ¶ 12. Full-time associates are also entitled to more paid vacation and personal days than part-time associates, and full-time sales associates pay less for health insurance benefits than part-time associates. *Id.* Neither full-time nor part-time associates of Kohl's are subject to the terms of a collective bargaining agreement. DSMF ¶ 18; PRDSMF ¶ 18.

Kohl's schedules their full-time and part-time sales associates' work using a computer program called Assets. DSMF ¶ 21; PRDSMF ¶ 21. Kohl's corporate

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<sup>10</sup> The EEOC interposed a qualified response to paragraph 9 and asserted that only some full-time sales associates are considered "supervisors," and only admit to these individuals performing the duties described in paragraph 9. PRDSMF ¶ 9. The Court accepts these qualifications as supported by the record citation and has modified the language in paragraph 9 accordingly. *See, e.g., supra* note 7; *Manning Dep.* at 82:7-82:14.

<sup>11</sup> Kohl's interposed a qualified response to the EEOC's paragraph 1. PSAMF ¶ 1; DRPSAMF ¶ 1. The EEOC's paragraph 1 overlapped with Kohl's paragraph 11, but it stated, in part: "Kohl's defines part-time associates as employees who work 30 or fewer hours per week." *Id.*; *see* DSMF ¶ 11; PRDSMF ¶ 11 (admitting Kohl's paragraph 11). Kohl's argued that the record citation does not support this portion of the EEOC's paragraph 1. After reviewing the record, the Court finds that the record supports the assertion that part-time associates are not guaranteed a minimum number of hours per week, but does not support the more specific assertion that they work 30 or fewer hours per week. The Court accepts Kohl's qualification as to paragraph 1.

office sets the projected workload in Assets, and each store's administrative assistant enters the availability of each part-time sales associate and any requests for leave or time off. *Id.* Full-time sales associates are entered into Assets as having "open availability,"<sup>12</sup> *id.*, which Mr. Treichler defined as the ability to work any time of the day or night as needed by the business.<sup>13</sup> PSAMF ¶ 16; DRPSAMF ¶ 16. Requiring full-time sales associates to have open availability is standard practice in the retail industry.<sup>14</sup> DSMF ¶ 14; PRDSMF ¶ 14. The workload is

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<sup>12</sup> This statement in Kohl's paragraph 21 overlapped with Kohl's paragraph 13. Paragraph 13 stated: "All full-time sales associates are required to have open availability, which means they must be available to work at any time of the day or night. Full-time sales associates are also required to work two nights a week and every other weekend, dependent on workload and the needs of the business. These requirements are necessary so that Kohl's can (A) meet the needs of the business, and (B) provide all full-time sales associates with 36 – 40 hours of work each week." DSMF ¶ 13. The EEOC admitted paragraph 21 but denied paragraph 13, asserting that "Kohl's does not have a written policy, rule, or guidelines requiring that all full-time sales associates have open availability," even though "Kohl's has a practice of requiring open availability and scheduling some associates to work two nights a week." PRDSMF ¶ 13. Viewing facts in favor of the EEOC, the record citation supports the assertion that open availability is not a strict requirement for full-time associates because, for example, exceptions were "pretty regularly made" to the scheduling rules and "there was a fair amount of leeway within those positions." *Id.* (quoting PRDSMF Attach 10 *Dep. Tr. of Kristina A. Wilner* at 79:4-79:15) (ECF No. 78-10). The Court accepts the EEOC's denial and declines to include paragraph 13.

Kohl's paragraph 15 stated: "Kohl's has always required its full-time sales associates to have open availability. There are no exceptions to this requirement." DSMF ¶ 15. The EEOC denied this statement, arguing that Ms. Manning herself was not required to have open availability, nor was there an open availability requirement for full-time associates without exceptions. PRDSMF ¶ 15. The EEOC cited deposition testimony of multiple Kohl's employees, supporting a finding of fact that exceptions to the open availability policy had been made. *Id.* The Court declines to include paragraph 15.

Kohl's paragraph 16 stated: "Applicants and associates are informed about Kohl's availability requirements when they apply for, or are promoted into, a full-time position." DSMF ¶ 16. The EEOC denied this statement, asserting that Ms. Manning herself was not informed of an open availability requirement when she became a full-time associate. PRDSMF ¶ 16. After reviewing the record in the light most favorable to the EEOC, the Court finds that the EEOC's position is supported by its record citation. *See Manning Dep.* at 100:14-101:1. The Court declines to include Kohl's paragraph 16.

<sup>13</sup> Kohl's interposed a qualified response to the EEOC's paragraph 16. DRPSAMF ¶ 16. Their response, however, did not directly address the statement made in paragraph 16. *Id.* Furthermore, viewing the facts in the light most favorable to the EEOC, the response does not conflict with what is stated in paragraph 16. *See id.* The Court declines to accept Kohl's qualified response.

<sup>14</sup> The EEOC denied paragraph 14, arguing that "Kohl's proffered no evidence of industry standard other than the lay opinions of Treichler and Carr in support of this fact." PRDSMF ¶ 14.

determined based on, among other things, sales volume projections for a given day, scheduled marketing events, floor or merchandise set-ups or changes, freight deliveries, markdowns or price changes, graphics or visual changes, merchandise recovery from the sales floor, changes to sale signs in the store, and maintenance.<sup>15</sup>

*Id.*

Once this information is entered, Assets automatically places sales associates in work schedules based on the anticipated workload for that week, the availability of each associate, the requests for leaves or time off, and the tasks each sales associate is trained to perform. DSMF ¶ 22; PRDSMF ¶ 22. Assets is also programmed to automatically schedule each full-time sales associate to work two nights a week and every other weekend. DSMF ¶ 24; PRDSMF ¶ 24. The program automatically distributes night and weekend shifts among the available full-time sales associates to ensure that a particular full-time sales associate is not scheduled

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However, Ms. Carr's affidavit and Mr. Treichler's deposition are properly part of the record before the Court, *see* FED. R. CIV. P. 56, and the EEOC has not provided a citation to record material that casts doubt upon the statement. The Court declines to accept the EEOC's denial and includes Kohl's paragraph 14.

<sup>15</sup> Kohl's paragraph 20 stated that sales volume in retail stores in general and in particular at the Westbrook Kohl's between 2008 and 2010 was usually highest during evening hours and weekends, and that evening and weekend shifts are "typically the least desirable work shifts in the retail industry." DSMF ¶ 20; PRDSMF ¶ 20. The EEOC denied both statements. With respect to sales volume, the EEOC cited Mr. Treichler's deposition testimony in which he stated that the "busiest" periods at Kohl's are "all day [Wednesday,] and Friday nights, Saturday and all day Sunday." PRDSMF ¶ 20; PRDSMF Attach 9 *Dep. Tr. of Michael Treichler* at 111:11-111:19 (ECF No. 78-9). It is not apparent from the record citation whether this statement referred to the Westbrook store, or to the trend at Kohl's stores nationwide. *Id.* Viewing the record in the light most favorable to the EEOC, Mr. Treichler's testimony conflicts with Kohl's assertion that sales volume at the Westbrook Kohl's was "usually the highest during the evening hours and weekends." The EEOC also creates a genuine dispute with respect to Kohl's assertion that evening and weekend shifts are "typically the least desirable," by citing Mr. Treichler's testimony that mid-day shifts were less desirable than evening shifts. *Id.* at 100:14-101:5. The Court excludes Kohl's paragraph 20.

to work every night shift during the week or during every weekend.<sup>16</sup> *Id.* From time to time, the workload or other business considerations may necessitate a deviation from this general scheduling rule. *Id.* Associates typically are not scheduled to work a closing shift at night immediately followed by an opening shift the next morning, and Assets is programmed to require at least nine hours between the times that an associate ends one shift and begins the next shift.<sup>17</sup> DSMF ¶ 25; PRDSMF ¶ 25. In addition, the Administrative Assistant reviews the schedule to make sure that Assets has not made any mistakes. *Id.*

Assets automatically generates the store-wide work schedule once a week. DSMF ¶ 22; PRDSMF ¶ 22. Assets also notifies the store how many hours of coverage it needs in each department and what time the coverage should begin and end. DSMF ¶ 23; PRDSMF ¶ 23. The hours the Westbrook Kohl's is open to the public vary based on the day of the week and time of the year, opening as early as 7:00 a.m. and closing as late as 11:00 p.m.; during Christmas season, store hours are extended, opening as early as 6:00 a.m. and closing as late as 12:00 a.m. DSMF ¶ 19; PRDSMF ¶ 19. Although Kohl's does not have set work shift times, employees often refer to an "opening shift" as one beginning between 6:00 a.m. and 8:00 a.m.

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<sup>16</sup> The EEOC interposed a qualified response to paragraph 24, stating that there is no evidence that the night shift is "also commonly referred to as the evening shift or closing shift." PRDSMF ¶ 24. Although the Court wonders whether the EEOC's objection is material, after reviewing the record in the light most favorable to the EEOC, the Court accepts this qualification and removes this statement from paragraph 24.

<sup>17</sup> Kohl's paragraph 25 stated: "Associates typically are not scheduled to work swing shifts (i.e., close the store at night and open the store the following morning.)" DSMF ¶ 25. The EEOC interposed a qualified response to "deny that a swing shift is necessarily a close followed the next day by an open." PRDSMF ¶ 25. Viewing the facts in the light most favorable to the EEOC, the Court finds support for their qualification in the record. The Court modifies paragraph 25 to remove the label of "swing shift," and deems the paragraph as altered admitted.

and a “mid-day shift” as beginning between 9:00 a.m. and 11:00 a.m., although 12:00 p.m. to 8:00 p.m. and 1:00 p.m. to 9:00 p.m. shifts could also be considered mid-day shifts.<sup>18</sup> PSAMF ¶ 2; DRPSAMF ¶ 2. Ryan Pease, Administrative Assistant at the Westbrook Kohl’s, stated that “[s]omebody who is an early person may define a night as 7:00. Somebody who is a night person may define a night as – you know what I mean – closing a 10:30, 11:30, a 12:30 shift.”<sup>19</sup> PSAMF ¶ 13; DRPSAMF ¶ 13.

Mr. Pease reviewed the store-wide weekly schedule generated by Assets to confirm that: (A) there were no gaps in coverage; (B) all of the full-time associates were scheduled to work at least 36 hours in a week; (C) no associates were scheduled to work more than five days in a given week; and (D) no associates were scheduled to close the store and open the store the following morning. DSMF ¶ 26; PRDSMF ¶ 26. After revising this schedule, Mr. Pease gave the schedule to Ms. Carr for final edits. DSMF ¶ 27; PRDSMF ¶ 27. Ms. Carr reviewed the weekly schedule to make sure that (A) there were no gaps in coverage, (B) full-time

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<sup>18</sup> Kohl’s interposed a qualified response to the EEOC’s paragraph 2, stating that “Kohl’s does not have set work shifts.” DRPSAMF ¶ 2. Viewing the facts in the light most favorable to the EEOC, the Court finds that the record supports the assertion that many employees at Kohl’s used the terminology “opening shifts” and “mid-day shifts,” and that these terms were understood to be associated with the corresponding hours in paragraph 2. However, the record does not support the notion that Kohl’s officially designated time periods for their work shifts. The Court modifies paragraph 2 accordingly and otherwise denies Kohl’s qualification.

<sup>19</sup> Kohl’s interposed a qualified response to the EEOC’s paragraph 13. Kohl’s response, however, only provided factual information from the record. This information can be read as consistent with the statements in paragraph 13, and Kohl’s did not explain why it interposed a qualified response. Therefore, the Court admits the EEOC’s paragraph 13.

associates were scheduled for at least 36 hours per week, and (C) no one was scheduled to work more than five days in one week.<sup>20</sup> *Id.*

## 2. Ms. Manning's Employment History at Kohl's

Ms. Manning has Type I diabetes and has been a diabetic for the past 37 years. DSMF ¶ 30; PRDSMF ¶ 30. Kohl's hired Ms. Manning as a part-time Freight Specialist at their Westbrook store in October 2006.<sup>21</sup> DSMF ¶ 33; PRDSMF ¶ 33. In this position, Ms. Manning recovered items from the sales floor and returned them to their proper place. *Id.* The typical shift for this position was during the early morning hours, and Ms. Manning worked twenty hours a week, beginning at 6:00 a.m. or 6:30 a.m. and ending between noon and 2:00 p.m. *Id.* While employed as a part-time Freight Specialist, Ms. Manning was able to perform all of the job duties of the position and did she did not request any type of accommodation. DSMF ¶ 34; PRDSMF ¶ 34.

Ms. Manning was later transferred to a position as a part-time sales associate in the Misses, Juniors & Men's Department. DSMF ¶ 35; PRDSMF ¶ 35. She was able to perform all of the job duties of that position. *Id.* The only

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<sup>20</sup> Kohl's paragraph 28 stated that the weekly work schedule "is posted on a Friday, which is 10 days in advance of the time scheduled to work." DSMF ¶ 28. The EEOC denied paragraph 28, stating that "weekly work schedules were not always posted 10 days in advance. They were, however, posted the week before." PRDSMF ¶ 28. After viewing the facts in the light most favorable to the EEOC, the Court excludes paragraph 28 because the EEOC's denial is supported by a record citation that supports its position. *See Manning Dep.* at 89:25-90:3.

<sup>21</sup> The EEOC interposed a qualified response to paragraph 33 to assert that Ms. Manning was hired in October 2006. PRDSMF ¶ 33. Kohl's paragraph 33 stated that Ms. Manning was hired on October 18, 2005. DSMF ¶ 33. The Court inserts the date of October 2006, which was offered by the EEOC and supported by the record. *See Manning Dep.* at 56:6-56:11.

accommodation Ms. Manning requested was a lunch break.<sup>22</sup> *Id.* On January 1, 2008, Kohl's promoted Ms. Manning to full-time sales associate as a Beauty Specialist.<sup>23</sup> DSMF ¶ 36; PRDSMF ¶ 36. From this time through the end of Ms. Manning's employment with Kohl's, Ms. Barnes—the Assistant Store Manager for Apparel and Accessories—was Ms. Manning's immediate supervisor. DSMF ¶ 43; PRDSMF ¶ 43. Ms. Barnes reported directly to Ms. Carr, the Store Manager. *Id.* As Beauty Specialist, Ms. Manning worked between 36 and 40 hours per week, and was often scheduled to work between 9:00 a.m. and 7:00 p.m. DSMF ¶ 37; PRDSMF ¶ 37. She was occasionally scheduled to work at night and she worked every other weekend. *Id.* Her work schedule was dictated, in large part, by the projected Beauty Department workload. *Id.*

As a full-time sales associate in the Beauty Specialist position, Ms. Manning was, among other things, responsible for overseeing the Beauty Department, effectively using company tools and sharing that information with others, and

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<sup>22</sup> Kohl's paragraph 35 states Ms. Manning was able to take a lunch break every day. DSMF ¶ 35. The EEOC interposed a qualified response to assert that Ms. Manning was not always able to take a lunch break. PRDSMF ¶ 35. The record citation supports the EEOC's position, and the Court accepts the EEOC's qualification. *See Manning Dep.* at 172:16-173:9, 176:13-177:25.

<sup>23</sup> The EEOC interposed a qualified response to paragraph 36, denying that “[t]he job description [for the Beauty Specialist position] accurately reflects the job duties that Manning performed when she [worked] as a Beauty Specialist.” PRDSMF ¶ 36. The EEOC argued that some of these duties were not applicable to Ms. Manning, as she did not have a team of associates to supervise or train. Viewing the facts in the light most favorable to the non-moving party, the Court accepts the EEOC's qualification. *See, e.g., Manning Dep.* at 82:7-82:14.

Kohl's paragraph 40 stated: “A full-time Beauty Specialist is a supervisory position.” DSMF ¶ 40. The EEOC denied this statement. PRDSMF ¶ 40. The Court accepts the EEOC's denial on the same grounds as paragraph 36: the record supports the position that Ms. Manning did not have a team of associates to supervise or train, and the record also supports the inference that full-time associates “lead and direct the work of part-time sales associates.” *See also supra* note 10.

interacting with other employees.<sup>24</sup> DSMF ¶ 41; PRDSMF ¶ 41. She was also responsible for assisting with price changes in the Beauty Department.<sup>25</sup> DSMF ¶ 38; PRDSMF ¶ 38. To do price changes, she had to report to work as early as 6:00 a.m. *Id.* At times, Ms. Manning also worked on the overnight shift to do price changes. *Id.* Ms. Manning was able to perform all job duties of the position while working as a Beauty Specialist, DSMF ¶ 39; PRDSMF ¶ 39, and did not have any issues with her work schedule during 2008 and 2009. DSMF ¶ 42; PRDSMF ¶ 42.

In January 2010, Kohl's implemented a nation-wide restructuring of the hours and staffing for the Beauty Department, which resulted in a reduction in the number of hours allocated to the Beauty Department in each of its stores. DSMF ¶ 44; PRDSMF ¶ 44. No jobs were eliminated as a result of the reduction in hours. *Id.* However, associates who worked in the Beauty Department had to work in other areas of the store in order to maintain their full-time or part-time status.<sup>26</sup>

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<sup>24</sup> The EEOC denied paragraph 41, on the basis that Ms. Manning “did not have a team in the Beauty Department to lead or assist and did not train new beauty associates.” PRDSMF ¶ 41. The record supports the EEOC’s position. *See supra* note 23. In its denial, however, the EEOC acknowledged that Ms. Manning was responsible for several of the responsibilities in paragraph 41. The Court, therefore, does not accept the EEOC’s denial wholesale but has rephrased paragraph 41 to reflect its qualifications.

<sup>25</sup> The EEOC interposed a qualified response to paragraph 38 to assert that Ms. Manning “assisted by doing the price changes in her Beauty Department. She generally would not have assisted with price changes in other Departments.” PRDSMF ¶ 33. Kohl’s paragraph 38 does not suggest that Ms. Manning assisted with price changes in other departments, as this description concerns Ms. Manning’s responsibilities during her time as a full-time Beauty Specialist. Nevertheless, the EEOC’s statement is supported by the record and, for clarification, the Court modifies paragraph 38 to specify that her assistance with price changes was “in the Beauty Department.” The Court admits paragraph 38 as altered.

<sup>26</sup> The EEOC denied that “no jobs were eliminated as a result of the reduction in hours,” making the following argument: “Deny that no jobs were eliminated as a result of the reduction in hours. As a result of the elimination of Manning’s full-time Beauty Specialist, Kohl’s changed her work hours. The change in her schedule aggravated her diabetes and caused more frequent and severe fluctuations in her glucose levels. Kohl’s refused to make any accommodations to her work schedule and Manning was constructively discharged.” PRDSMF ¶ 44. The EEOC is apparently denying that “no jobs were eliminated as a result of the reduction in hours” on the basis that the

*Id.* During that month, Ms. Carr and Ms. Barnes met with Ms. Manning to inform her about the Beauty Department restructuring and the resulting reduction in hours in the department. DSMF ¶ 45; PRDSMF ¶ 45. Ms. Carr and Ms. Barnes told Ms. Manning that the full-time sales associate position as a Beauty Specialist was being eliminated, and that there would only be approximately 18 to 20 hours of work in the Beauty Department each week. *Id.* Ms. Manning was told that if she wanted to remain a full-time sales associate, she would have to work in other areas of the store where coverage was needed.<sup>27</sup> *Id.* According to Kohl’s witnesses, Ms. Manning was being phased out as a full-time Beauty Specialist and in the process of being transitioned to another position in another Department when one became available that suited her skill set and personality.<sup>28</sup> PSAMF ¶ 15; DRPSAMF ¶ 15. A Kohl’s employee explained that until “another position opened up,” they had to preserve Ms. Manning’s status as a full-time associate. *Id.*

Thereafter, Ms. Manning became a full-time sales associate who floated among several departments, including the Beauty Department, the Misses, Juniors

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restructuring caused Ms. Manning’s constructive discharge. The EEOC’s objection is a legal argument, which does not contradict Kohl’s paragraph 44. Kohl’s clarifies paragraph 44 by stating: “associates who worked in the Beauty Department had to work in other areas of the store in order to maintain their full-time or part-time status.” *Id.* Further, the EEOC’s record citation—a letter from Ms. Manning’s physician asking for a more regular schedule—does not support its denial, while Kohl’s statement is supported by its record citation. DSMF ¶ 44; DSMF Attach 1 *Aff. of Tricia Carr* ¶ 25 (ECF No. 72-1) (*Carr Aff.*). The Court declines to accept the EEOC’s denial.

<sup>27</sup> Kohl’s paragraph 45 also stated: “Manning chose to continue as a full-time sales associate” at the meeting and that “Manning told Carr and Barnes that her decision was based on her desire to maintain her benefits as a full-time sales associate.” DSMF ¶ 45. The EEOC denies these statements. PRDSMF ¶ 45. Viewing the record in the light most favorable to the EEOC, the record supports the EEOC’s denial. *See Manning Dep.* at 98:16-100:13. The Court modified paragraph 45 to exclude those statements.

<sup>28</sup> Kohl’s interposed a qualified response to the EEOC’s paragraph 15. Viewing the facts in the light most favorable to the EEOC, Kohl’s responsive facts do not contradict the statements in paragraph 15. The Court declines to accept Kohl’s qualified response.

& Men's Department, and the Apparel & Accessories Department. DSMF ¶ 46; PRDSMF ¶ 46. Assets scheduled Ms. Manning to work most of the available hours in the Beauty Department and the remaining hours in other departments, where she was trained to work, based on the workload in each department. DSMF ¶ 48; PRDSMF ¶ 48. Ms. Carr has testified that Ms. Manning was a supervisor both when she was the beauty specialist and when the full-time beauty position was eliminated,<sup>29</sup> PSAMF ¶ 10; DRPSAMF ¶ 10, and that Ms. Manning had supervisory responsibilities in these other departments. DSMF ¶ 49; PRDSMF ¶ 49. Scheduling was not part of Ms. Manning's job duties during this time or any other period in which she worked at Kohl's.<sup>30</sup> DSMF ¶ 29; PRDSMF ¶ 29. She was responsible for supervising part-time associates and the work load on the sales floor, including, without limitation, recovery, cleanup, and price change events.<sup>31</sup>

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<sup>29</sup> The EEOC's paragraph 10 also included Ms. Carr's statements about payroll codes and classifications. PSAMF ¶ 10. Kohl's interposed a qualified response to paragraph 10, denying these statements on the basis that "[t]he record citation does not support the EEOC's assertions." DRPSAMF ¶ 10. After reviewing the record and viewing facts in the light most favorable to the EEOC, the Court agrees with Kohl's that record citation does not contain statements in support of the EEOC's disputed assertions. The EEOC refers to pages 57 through 60 of Ms. Carr's deposition transcript but neglected to place those pages of her deposition before the Court. The Court accepts Kohl's qualifications, and admits only the first sentence of paragraph 10.

<sup>30</sup> The EEOC interposed a qualified response to Kohl's paragraph 29, denying the statement that "Manning does not know how scheduling was done at the Westbrook Kohl's." PRDSMF ¶ 29. The Court omits this statement because the record confirms that Ms. Manning was aware of facts related to scheduling at Kohl's, including that "computer software is used to prepare the schedule and that Carr was involved in preparing, revising, and approving the schedule . . ." *Id.* (citing *Manning Dep.* at 123:21-124:02).

<sup>31</sup> The EEOC denied Kohl's paragraph 49. PRDSMF ¶ 49. However, Kohl's provided a record citation in support of paragraph 49, while the EEOC's response provided a general citation to three previous EEOC response paragraphs. *Id.* Local Rule 56(f) states that "[f]acts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted." D. ME. LOC. R. 56(f). To be "properly controverted," each denial or qualification to a statement of fact, set forth in an opposing statement of material facts or a reply statement of material facts, must be supported "by a record citation as required by this rule." *Id.* 56(c). The EEOC's general citation violates the local rule. Furthermore, the cited paragraphs address the period during which Ms. Manning was a full-time

DSMF ¶ 49; PRDSMF ¶ 49. After the Beauty Department was restructured, the sales projections called for more hours in the Beauty Department on nights and weekends and fewer hours during weekdays.<sup>32</sup> DSMF ¶ 48. Ms. Manning also worked customer service, point-of-sales (cashier), fitting rooms, price changes, and whatever else she was scheduled to do.<sup>33</sup> DSMF ¶ 46; PRDSMF ¶ 46. During this time—after the January 2010 meeting—Ms. Manning’s job duties never changed; she was just assigned in other departments of the Westbrook store. DSMF ¶ 47; PRDSMF ¶ 47. Her work hours, however, became more erratic.<sup>34</sup> PRDSMF ¶ 47.

While Ms. Manning worked at Kohl’s, she was never disciplined. DSMF ¶ 73; PRDSMF ¶ 73. Ms. Manning was a good employee who received good performance evaluations as well as pay raises in 2008 and 2009. DSMF ¶¶ 74, 75; PRDSMF ¶¶ 74, 75. While Ms. Manning was a full-time Beauty Specialist, she asked for time off for the death of her friend, the death of her mother, for a broken foot, and for two

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associate in the Beauty Department, and paragraph 49 addresses her responsibilities after the full-time Beauty Specialist position was eliminated. The Court deems paragraph 49 admitted.

<sup>32</sup> The EEOC denied that there is any support in the record for this statement “other than Ms. Carr’s affidavit.” DSMF ¶ 48; PRDSMF ¶ 48. Ms. Carr has personal knowledge of the information stated in her affidavit. Thus, the affidavit is properly part of the record before the Court, *see* FED. R. CIV. P. 56, and the EEOC has not provided a citation to record material to contest the statement. Therefore, the Court declines to accept the EEOC’s qualification.

<sup>33</sup> Kohl’s paragraph 46 also stated: “Manning did the same type of work that the other full-time sales associates perform on a regular basis.” DSMF ¶ 46. The EEOC denied this statement, pointing out that “[t]he other full-time associates were Sales Supervisors and Area Supervisors, a Shoe Specialist, and a Jewelry Specialist.” PRDSMF ¶ 46. As this Court must view the record in the light most favorable to the EEOC, and particularly in light of the breadth of Kohl’s contested statement, the Court includes the EEOC’s qualification and omits this statement from paragraph 46.

<sup>34</sup> The EEOC interposed a qualified response to Kohl’s paragraph 47, stating that although “Manning’s job duties did not change,” “[h]er work hours . . . went from having fairly steady hours . . . to schedules with erratic and extreme hours.” PRDSMF ¶ 47. As this assertion is supported by the record, the Court modifies paragraph 47 to clarify any ambiguity about the following statement: “Manning’s job duties never changed.” DSMF ¶ 47.

broken wrists.<sup>35</sup> DSMF ¶ 72; PRDSMF ¶ 72. Full-time associates at Kohl's are entitled to receive benefits including paid sick leave, paid personal days, and bereavement pay. *See* DSMF ¶ 12. Ms. Manning was allowed to take all the time off she requested and she returned to work following her leaves. DSMF ¶ 72; PRDSMF ¶ 72. Ms. Manning was allowed to take breaks at work when she needed them.<sup>36</sup> DSMF ¶ 76; PRDSMF ¶ 76.

Ms. Manning received training regarding harassment and discrimination at every place she has worked, including Kohl's.<sup>37</sup> DSMF ¶ 77; PRDSMF ¶ 77. As a result, Ms. Manning knew how to report something that she found to be discriminatory or harassing.<sup>38</sup> *Id.* Ms. Manning received a copy of Kohl's Associate Handbook while she worked at Kohl's, which contained at least some information on discrimination and harassment, and Ms. Manning was also aware that she could

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<sup>35</sup> The EEOC interposed a qualified response to Kohl's paragraph 72, admitting to the general facts in the paragraph but "object[ing] to the characterization of sick, vacation, personal, and bereavement leave, benefits to which full-time employees are entitled, as a leave of absence." The EEOC referred to DSMF ¶ 12 in support of its argument. As the EEOC's interpretation is supported by the record and as this court must view all facts in the light most favorable to the nonmoving party, the Court modifies paragraph 72 accordingly.

<sup>36</sup> The EEOC interposed a qualified response to Kohl's paragraph 76 but did not provide a record citation to support its position. PRDSMF ¶ 76. As Kohl's paragraph 76 is supported by its record citation and because the EEOC's qualified response violates Local Rule 56, the Court declines to accept the EEOC's qualification. *See supra* note 31.

<sup>37</sup> The EEOC interposed a qualified response to Kohl's paragraph 77 but did not provide a record citation to support its position. PRDSMF ¶ 77. As Kohl's paragraph 77 is supported by its record citation and because the EEOC's qualified response violates Local Rule 56, the Court declines to accept the EEOC's qualification. *See supra* note 31.

<sup>38</sup> Kohl's paragraph 80 sets forth complaint procedures available to Kohl's associates. However, this statement is unsupported by Kohl's record citation. *Compare* DSMF ¶ 80 (citing "Martin Dep. 93:2 – 100:9"), *with* DSMF Attach 18 *Martin Dep. Tr.* (ECF No. 72-18) (not including pages 93-95, or 98-100). The Court is therefore unable to determine whether paragraph 80 is supported by the record, and declines to accept paragraph 80 under Local Rule 56(f). *See* D. ME. LOC. R. 56(f) ("The court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment").

view some Kohl's policies online.<sup>39</sup> DSMF ¶ 78; PRDSMF ¶ 78. Kohl's also has workplace postings in the break room regarding harassment and discrimination. DSMF ¶ 79; PRDSMF ¶ 79.

Kohl's provides annual training regarding the Americans with Disabilities Act (ADA) to associates and managers.<sup>40</sup> DSMF ¶ 81; PRDSMF ¶ 81. Kohl's has a policy regarding the ADA that is maintained on K-net, the Company's intranet, and is available to associates.<sup>41</sup> DSMF ¶ 82; PRDSMF ¶ 82. With the exception of Ms. Manning's claim, Kohl's has not received a complaint of disability discrimination from an employee in Maine during the past five years.<sup>42</sup> DSMF ¶ 83; PRDSMF ¶ 83.

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<sup>39</sup> Kohl's paragraph 78 stated: "When Manning worked at Kohl's, she received a copy of Kohl's Associate Handbook. Manning reviewed Kohl's policies regarding discrimination and harassment. Manning was also aware that she could review Kohl's policies online." DSMF ¶ 78. The EEOC interposed a qualified response, admitting that Ms. Manning received the handbook but "deny[ing] that all Kohl's policies on discrimination and harassment are in it," "[d]eny[ing] that Manning reviewed Kohl's policies regarding discrimination and harassment," and "[a]dmitting that Manning was aware she could review *some* Kohl's policies online, but was not aware she could view Kohl's policies on discrimination and harassment online." PRDSMF ¶ 78 (emphasis in original). Viewing the facts in the light most favorable to the EEOC, the EEOC's record citation supports its assertions. The Court modified Kohl's paragraph 78 to reflect the EEOC's qualifications.

<sup>40</sup> The EEOC stated that its response to Kohl's paragraph 81 was "qualified" but provided no statement or citation in support of its qualification. The EEOC's response therefore violates Local Rule 56. *See supra* note 31. The Court, having determined that Kohl's record citation supports the statements made in paragraph 81, therefore declines to accept the EEOC's qualified response.

<sup>41</sup> The EEOC interposed a qualified response to Kohl's paragraph 82, admitting that Kohl's had such a policy on the Company's intranet, but "deny[ing] that the policy is made available to associates, like Manning, who work on the sales floor and whose job functions do not include access to a computer at their work stations." The EEOC's response contained no citation in support of its apparent qualification. The EEOC's response therefore violates Local Rule 56. *See supra* note 31. The Court, having determined that Kohl's record citation supports the statements in paragraph 82, declines to accept the EEOC's qualified response.

<sup>42</sup> The EEOC interposed a qualified response to Kohl's paragraph 83, stating that the "EEOC cannot respond to this statement because it is prohibited by statute from disclosing any information about charges filed prior to instituting an action in court." PRDSMF ¶ 83. This statement is insufficient to conclude there is a genuine dispute of material fact as to whether Kohl's has had such a complaint filed in the last five years. Kohl's also cited deposition testimony by Nathan Martin and Michael Treichler. *Id.* Both stated that they handled at least one "similar situation" in the past. *See id.* Mr. Martin is a Kohl's human resource employee who works in Pennsylvania, *see* PRDSMF ¶

### 3. The Events Giving Rise to the Dispute Between Ms. Manning and Kohl's

In March of 2010, Ms. Manning notified Ms. Barnes<sup>43</sup> that she was having problems working her scheduled hours.<sup>44</sup> DSMF ¶ 50; PRDSMF ¶ 50. Some of the shifts Ms. Manning worked around that time include: a 6:00 a.m. to 2:00 p.m. shift on March 17; a 6:30 p.m. to 10:30 p.m. shift on March 19; and a 10:00 a.m. to 6:30 p.m. shift on March 20.<sup>45</sup> PSAMF ¶ 4; DRPSAMF ¶ 4. Ms. Manning told Ms.

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80, and Mr. Treichler is a territory human resources director also working in Pennsylvania. DSMF Attach 21 *Treichler Dep.* at 41:6-41:11 (*Treichler Dep.*) (ECF No. 72-21). The witnesses' statements do not mention when or where the allegedly similar situation occurred. Even viewing this information in the light most favorable to the EEOC, it is insufficient to generate a genuine dispute of material fact as to whether Kohl's received another employee complaint in Maine in the last five years. The Court declines to accept the EEOC's qualified response.

<sup>43</sup> The EEOC interposed a qualified response to Kohl's paragraph 50, asserting that Ms. Manning also informed the Assistant Store Manager that she was having health problems due to her erratic hours at work. PRDSMF ¶ 50. As there is no conflict between this statement and paragraph 50, the Court declines to accept the EEOC's qualified response. *See* D. ME. LOC. R. 56(f).

<sup>44</sup> The EEOC's paragraph 8 stated: "On March 15, 2010 Manning called the Maine Center for Endocrinology and Triage Unit. Manning reported that her workplace changed her work hours and now her numbers were all over the place. Manning reported night numbers as high as 400." PSAMF ¶ 8. The EEOC cited "EEOC Exhibit 24" for this proposition. *Id.* Kohl's denies this paragraph, asserting that "[t]he record citation does not support the EEOC's assertion," and objects to the assertion on the basis that it is "argumentative and [ ] based on pure speculation." DRPSAMF ¶ 8. Exhibit 24 is an email from Ms. Barnes (who appears to be addressed as Ms. Grover in the email) to Ms. Carr and Ms. Gamache, addressing the meeting Ms. Barnes and Ms. Carr had with Ms. Manning on March 31st. PSAMF Attach 24 *Ex. 24* (ECF No. 78-24). The email describes how Ms. Manning explained her health issues, but there is nothing in the email suggesting that Ms. Manning called or otherwise reported some of her health issues on March 15. *Id.* The Court accepts Kohl's denial of the EEOC's paragraph 8.

<sup>45</sup> The EEOC's paragraph 4 listed five shifts Ms. Manning worked between March 12, 2010 and March 20, 2010. PSAMF ¶ 4. Kohl's interposed a qualified response, arguing that the record citation does not support the EEOC's assertion. DRPSAMF ¶ 4. The Court accepts Kohl's qualification as to the shifts worked on March 12 and 13, because the record citation does not include Ms. Manning's work schedule on those days. However, the analysis is different for the shifts on March 17, 19, and 20. The EEOC's record citation includes a copy of Kohl's employee shift schedule for the week of March 14-20, which lists Ms. Manning as working on those three dates. *See* PSAMF Attach 15 *Kohl's Posting Schedule* (ECF No. 78-15). By contrast, Kohl's record citation includes a timecard audit trail for Ms. Manning's shifts between February 28th and March 23rd, and this citation suggests that Ms. Manning did not work on March 20th. *See* DRPSAMF Attach 3 *Timecard Audit Trail* (ECF No. 106-3). As this Court must view the facts in the light most favorable to the EEOC, it finds that the EEOC's record citation is sufficient to generate a genuine dispute of material fact as to whether Ms. Manning worked the March 20th shift. The Court accepts Kohl's qualification as to Ms. Manning's shifts on March 12th and 13th but not as to the remaining shifts in paragraph 4.

Barnes that her difficulties were due to her diabetes and that she needed a steady work schedule, and Ms. Barnes replied that she needed to obtain a doctor's note to support her request. DSMF ¶ 50; PRDSMF ¶ 50. This was the only conversation that Ms. Manning had with Ms. Barnes where Ms. Manning expressed concerns about her work schedule, before the events discussed in this section. *Id.*

In response to Ms. Barnes' request for a doctor's note, Ms. Manning visited her endocrinologist, Dr. Brodsky, on March 25th. DSMF ¶ 51; PRDSMF ¶ 51. Dr. Brodsky's notes indicate that Ms. Manning was anxious and stressed and that the stress was causing high glucoses.<sup>46</sup> PSAMF ¶ 5; DRPSAMF ¶ 5. He wrote that she had many stressors including "[h]er job and its difficult schedule and that her 'glucoses are erratic but high overall, esp. past 2 mos.'"<sup>47</sup> *Id.* (alteration in original).

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The EEOC's paragraph 3 stated: "On February 22, 2010, Manning was scheduled to work from 5:00 a.m. to 11:00 a.m. and on February 28, 2010, Ms. Manning was scheduled to work from 11:00 p.m. to 5:00 a.m." PSAMF ¶ 3. The Court admits this paragraph; however, it includes the information only in this footnote, because: (1) it finds the paragraph to be immaterial, based upon Kohl's response; and (2) to admit paragraph 3 without mentioning Kohl's qualification would be misleading. Kohl's stated that Ms. Manning did not work from 11:00 p.m. to 5:00 a.m. on February 28, but instead worked from 11:00 a.m. to 5:00 p.m. DRPSAMF ¶ 3. This assertion is supported by the record and uncontested. *See id.* For the purposes of this motion, it is not material that Ms. Manning was scheduled to work this particular 11:00 p.m. to 5:00 a.m. shift when she ultimately did not work that shift.

<sup>46</sup> Kohl's interposed a qualified response to the EEOC's paragraph 5. DRPSAMF ¶ 5. However, the response attempted to qualify paragraph 5 by adding factual information that, viewing the record in the light most favorable to the EEOC, is not inconsistent with paragraph 5. *Id.* For example: "Dr. Brodsky notes that there were a number of stressors in Manning's life that was contributing to the fluctuations in her blood sugar levels, including, her job (not just the schedule) . . ." *Id.* Similarly, the response asserted that "Dr. Brodsky does not render any opinion as to whether a predictable day shift would have allowed Manning to perform the essential functions of her job." Both statements can be viewed as not conflicting with the statements made in paragraph 5. Therefore, the Court declines to accept Kohl's qualification.

<sup>47</sup> The EEOC's paragraph 6 asserted more details about Ms. Manning's diabetes and the effect on her employment. PSAMF ¶ 6. Kohl's denied paragraph 6. DRPSAMF ¶ 6. As the EEOC did not provide the Court with the pages of Dr. Brodsky's deposition testimony it cited in paragraph 6, the Court cannot verify this information and has excluded paragraph 6.

Dr. Brodsky gave Ms. Manning a letter addressed to Tricia Carr which stated:

I am writing to ask your assistance in accommodating the medical condition of my patient, Pamela Manning. In particular, I am asking that she be allowed to work a predictable day shift (9:00 a.m. to 5:00 p.m. or 10:00 a.m. to 6:00). Ms. Manning has type 1 diabetes. She takes five daily injections of insulin that must be timed to match her meals and activity.

Ms. Manning's diabetes control has recently deteriorated and exhibits a clear stress pattern. She reports that she is having difficulty matching her insulin action to her work schedule in your store when she swings shifts (e.g. working late shift one day and returning for an early shift the next day). The blood sugar fluctuation caused by the schedule change often induces additional stress and more sugar fluctuation. A more predictable and regular schedule should help smooth her blood sugar and help prevent serious complication of the diabetes.

Thank you for considering this information in your dealings with my patient, Pamela Manning. If I can provide additional information that would be helpful to you, please let me know.

DSMF ¶ 51; PRDSMF ¶ 51. The hours of 9:00 to 5:00 and 10:00 to 6:00 were proposed as an example or guideline of the kind of schedule that would be acceptable; the doctor did not make a demand limited to those hours.<sup>48</sup> PSAMF ¶ 14; DRPSAMF ¶ 14. On March 26, Ms. Manning handed this letter to Tina LaChance, the Assistant Store Manager of Home & Kids. DSMF ¶ 52; PRDSMF ¶ 52. Ms. LaChance read the letter and instructed Ms. Manning to leave the letter on

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<sup>48</sup> Kohl's denies the EEOC's assertion about the proposed hours. DRPSAMF ¶ 14. Viewing the record in the light most favorable to the EEOC, the EEOC's characterization is supported by the record citation. The Court declines to accept Kohl's denial.

Ms. Carr's desk, which she did that day. The following day, Ms. Carr found a note on her desk from Dr. Brodsky.<sup>49</sup> DSMF ¶ 53; PRDSMF ¶ 53.

On March 27, Ms. Carr contacted Mr. Treichler for guidance on how to address the situation. DSMF ¶ 53; PRDSMF ¶ 53. As the Territory Human Resources Manager, Mr. Treichler was responsible for associate relations and making sure that decisions with respect to associates were fair, consistent, and objective. *Id.* By email on March 29, Mr. Treichler responded “[c]learly we can not have her not work nights. BUT, we can work with her to avoid the ‘swing shifts’ – A close followed by an opening. Would you be able to speak to her about this option?”<sup>50</sup> PSAMF ¶ 9; DRPSAMF ¶ 9. Mr. Treichler did not tell Ms. Carr that Ms. Manning had to work closings.<sup>51</sup> PSAMF ¶ 9. In his deposition testimony, Mr. Treichler stated that “to have the availability wide open to include days, mids,

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<sup>49</sup> Kohl's paragraph 84 stated: “The only evidence Manning has to support her claim that Kohl's acted with malice or reckless indifference to her rights is this doctor's note from Dr. Brodsky.” DSMF ¶ 84. The EEOC denied Kohl's paragraph 84, stating that “[t]he entire record supports Manning's claim.” PRDSMF ¶ 84. The EEOC failed to provide a record citation in support of its denial. Although the EEOC's response violates Local Rule 56, *see supra* note 31, Kohl's statement is legal argument, not a statement of fact and the Court declines to include Kohl's paragraph 84.

<sup>50</sup> The EEOC denied Kohl's paragraph 54, which characterized what Mr. Treichler communicated to Ms. Carr. DSMF ¶ 54; PRDSMF ¶ 54. The EEOC objected on the ground that paragraph 54 misconstrues what Mr. Treichler stated in his email. The record citation supports the EEOC's objection and the Court declines to include Kohl's paragraph 54.

The EEOC denied Kohl's paragraph 55 for similar reasons. DSMF ¶ 55; PRDSMF ¶ 55. Kohl's paragraph 55 stated in part: “Treichler believed that Kohl's would be able to work with Manning to find a way to accommodate her medical restrictions.” The record citation supports the EEOC's denial of Kohl's statements in paragraph 55. The Court also excludes paragraph 55.

<sup>51</sup> The EEOC's paragraph 9 stated in part: “Treichler did not tell Carr that Manning had to work closings. That would have been a misstatement of Kohl's practices.” PSAMF ¶ 9. Kohl's interposed a qualified response to the EEOC's paragraph 9, denying these statements in paragraph 9. DRPSAMF ¶ 9. Viewing the record in the light most favorable to the EEOC, the former statement in paragraph 9 is supported by the record, but the latter statement is conclusory, argumentative, and not supported by the record. The Court modifies paragraph 9 accordingly, and deems the paragraph as altered admitted.

nights, closes and everything in between” is an essential job function for all its full-time sales associates.<sup>52</sup> PSAMF ¶ 16; DRPSAMF ¶ 16.

On March 30, 2010, Ms. Carr spoke with Ms. Manning and told her that she and Ms. Barnes would meet with her to discuss the letter from Dr. Brodsky and taking breaks.<sup>53</sup> DSMF ¶ 57; PRDSMF ¶ 57. The following day, Ms. Carr and Ms. Barnes met with Ms. Manning in Ms. Carr’s office to discuss the note from Dr. Brodsky.<sup>54</sup> DSMF ¶ 58; PRDSMF ¶ 58. During this meeting, Ms. Manning asked to be given a steady work schedule and not be scheduled to work any swing shifts. *Id.* Ms. Carr documented this meeting in an email, noting that Ms. Manning stated she did not understand why she could not have a more consistent day-to-day schedule.<sup>55</sup> PSAMF ¶ 22; DRPSAMF ¶ 22. Ms. Manning also stated that she was willing to

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<sup>52</sup> See *supra* note 13.

<sup>53</sup> The EEOC interposed a qualified response to paragraph 57, denying the following statement: “During that same discussion, they spoke about Ms. Manning’s breaks, because Ms. Carr wanted to ensure that Ms. Manning continued to be able to take her breaks.” PRDSMF ¶ 57. The EEOC argued that “continued to be able to take her breaks” is inaccurate because on some days, Ms. Manning did not get a break until 6 hours after her shift started. *Id.* However, Ms. Carr also said that “breaks would need to be addressed” at the meeting. *Id.* Viewing the record in the light most favorable to the EEOC, the record citation supports the EEOC’s qualification. The Court modifies paragraph 57 accordingly and deems the paragraph as altered admitted.

<sup>54</sup> Kohl’s paragraph 58 also stated: “Carr asked Manning to explain specifically what Dr. Brodsky was requesting. Manning said Dr. Brodsky’s note was clear and that he requested that Manning be given a steady work schedule and that she not be scheduled to work any swing shifts. Manning did not request any accommodations beyond what was contained in Dr. Brodsky’s note.” DSMF ¶ 58. The EEOC denied paragraph 58. PRDSMF ¶ 58. The basis of the EEOC’s denial of the second sentence—as opposed to qualified response—is unclear. The EEOC asserts that Ms. Manning requested a steady schedule and asked not to work swing shifts, and raised concerns about two particular upcoming shifts. PRDSMF ¶ 58. Even though the Court is required to view the facts in the light most favorable to the EEOC, it has included the second sentence, modified to clarify that this is what Ms. Manning, not the doctor was requesting, and has not included the last sentence, which was properly denied.

<sup>55</sup> Kohl’s asserted an “admit/qualify” response to the EEOC’s paragraph 22. DRPSAMF ¶ 22. The response does not state what it seeks to qualify. Although Kohl’s response provides additional relevant information, it does not conflict with the factual assertions in paragraph 22. The Court declines to accept Kohl’s qualified response.

work weekends.<sup>56</sup> *Def.’s Reply* at 11 n.14. Ms. Carr told Ms. Manning that “the needs of the business dictate where she worked” and “would require at times shifts that are early, days, mids and closes,” PSAMF ¶ 22; DRPSAMF ¶ 22, and that Kohl’s could not schedule her to work a steady 9 a.m. to 5 p.m. or 10 a.m. to 6 p.m. schedule.<sup>57</sup> DSMF ¶ 59; PRDSMF ¶ 59. Ms. Barnes also documented the meeting in an email, writing that Ms. Carr told Ms. Manning that she had to work two “closes”<sup>58</sup> a week and weekends.<sup>59</sup> PSAMF ¶ 21; DRPSAMF ¶ 21. Ms. Barnes also stated they were “keeping to consistency in regards to all full timers in the building and their schedules,”<sup>60</sup> *id.*, and Ms. Carr told Ms. Manning that, if she gave Ms.

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<sup>56</sup> Kohl’s assumes, without admitting, that Ms. Manning was willing to work weekends for the purposes of summary judgment. *See Def.’s Reply* at 11 n.14; DRPSAMF ¶ 17. As a result, the EEOC’s paragraphs 17 and 18 are immaterial for the purposes of summary judgment, and the Court does not include them—or address Kohl’s responses—in the summary judgment record. *See* PSAMF ¶ 17 (“Carr and Barnes testified that Manning demanded and would consider nothing short of a Monday-through-Friday schedule”); PSAMF ¶ 18 (“Ms. Manning unequivocally denies that she requested a purely Monday-through-Friday schedule”). *See also* D. ME. LOC. R. 56(g).

<sup>57</sup> Kohl’s paragraph 59 stated: “During their discussion, Carr told Manning that she would not be scheduled to work any swing shifts and that she would continue to be allowed to take consistent meal and rest breaks. Carr also told Manning that Kohl’s could not schedule her to work a steady 9 a.m. – 5 p.m. or 10 a.m. – 6 p.m. schedule and that full-time associates are expected to work a variety of shifts, including, early morning, mid-day and closing shifts.” DSMF ¶ 59. The EEOC denied this paragraph, asserting that Ms. Manning denied that she was told she would not be scheduled to work swing shifts, that she did not recall any discussion of breaks during the meeting, and that she had requested a “steadier schedule” as opposed to “a 9 a.m. to 5 p.m. or 10 a.m. to 6 p.m. schedule.” PRDSMF ¶ 59. After reviewing the record citation and viewing the facts in the light most favorable to the EEOC, the Court excluded the first sentence of paragraph 59 because the EEOC has generated a genuine dispute over whether the statements in that sentence are accurate. However, information in the second sentence was not disputed by the EEOC’s response and is consistent with EEOC’s paragraph 22, which has been admitted. *See* PSAMF ¶ 22. The Court rejects the EEOC’s denial of the second sentence in Kohl’s paragraph 59.

<sup>58</sup> Ms. Barnes testified that she uses the words night, evening, and close synonymously. *See* DRPSAMF ¶ 21.

<sup>59</sup> Kohl’s interposed a qualified response to the EEOC’s paragraph 21. DRPSAMF ¶ 21. The response may provide additional relevant information, but the information does not conflict with the factual assertions in paragraph 21. The Court declines to accept Kohl’s qualified response.

<sup>60</sup> Kohl’s paragraph 60 stated: “Carr and Barnes tried to speak with Manning about other potential scheduling accommodations, but Manning would not discuss any other options with them.” DSMF ¶ 60. The EEOC denied this paragraph, stating that “[n]either Carr nor Barnes tried to speak to Manning about any potential scheduling accommodations. Rather, they rejected all options presented by Manning and offered no alternatives.” PRDSMF ¶ 60. Viewing the facts in the light

Manning the accommodation she was requesting, she would have to do that for everyone else. DSMF ¶ 61; PRDSMF ¶ 61. If a full-time sales associate was not required to have open availability and to work early mornings, nights and weekends, Kohl's would be forced to (A) require other full-time sales associates to work additional mornings, nights and weekends to ensure appropriate staffing, or (B) hire and train another full-time sales associate to perform those job duties.<sup>61</sup> DSMF ¶ 56; PRDSMF ¶ 56. Kohl's did not consider the financial cost of Ms. Manning's request before rejecting it.<sup>62</sup> PSAMF ¶ 19; DRPSAMF ¶ 19.

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most favorable to the EEOC, the Court excluded paragraph 60 because the EEOC has generated a genuine dispute over whether paragraph 60 accurately characterizes what occurred at the meeting.

<sup>61</sup> Kohl's paragraph 56 also stated: "Given the nature of its business, Kohl's does not allow its full-time sales associates to work only the convenient or desirable day shifts because it would jeopardize Kohl's ability to staff the retail store during the night and week-end shifts when sales volume is the highest." The EEOC interposed a qualified response to paragraph 56, admitting "that Kohl's does not allow its full-time sales associates to work only day shifts" and denying the remainder of the paragraph. *See* PRDSMF ¶ 56 ("Deny and object to this paragraph generally, as these are not statements of fact capable of being verified with any admissible evidence in the record. Rather they are arguments"; "Deny that shifts which start mid-morning are convenient or desirable"). Kohl's replied to this qualified response, arguing that the EEOC's objection should be waived because the objection is "averted to in a perfunctory manner, unaccompanied by some effort at developed argumentation." *Def. Kohl's Resp. to Pl.'s Objection to Def.'s Statement of Material Fact* (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)) (ECF No. 106, at \*13). Kohl's also argued that the EEOC's position has no merit because Ms. Carr's sworn affidavit, which supports the assertion made in paragraph 56, is properly before the Court on summary judgment.

The Court partially agrees with Kohl's. Ms. Carr's affidavit supports the statement in paragraph 56 and is properly considered on summary judgment, so the EEOC's blanket objection "to this paragraph generally" is overruled. However, the second sentence in paragraph 56 turns on whether the "day shifts" are "convenient or desirable." *See* DSMF ¶ 56. The EEOC properly controverted this sentence by providing a record citation that, viewing the facts in the light most favorable to the EEOC, supports the fact that "a mid-day shift was not generally desirable." PRDSMF ¶ 56; *see supra* note 15. The Court accepts the EEOC's qualified response as to the second sentence of paragraph 56.

<sup>62</sup> Kohl's interposed a qualified response to the EEOC's paragraph 19, asserting that "Kohl's has an ADA policy and provides reasonable accommodations to qualified individuals with disabilities. Kohl's did not need to consider the cost of the accommodation that Manning was requesting because Manning asked for an accommodation that did not exist . . ." DRPSAMF ¶ 19. Although this statement may provide additional relevant information, it asserts a legal argument and does not conflict with the factual assertions in paragraph 19. The Court declines to accept Kohl's qualified response.

After hearing Ms. Carr, Ms. Manning became upset and told her that she had no choice but to quit. DSMF ¶ 61; PRDSMF ¶ 61. Ms. Barnes asked Ms. Manning whether she was sure about resigning. *Id.* Ms. Manning stated that she was concerned that if she kept working her current schedule she would either go into ketoacidosis or into a coma. *Id.* She put her keys to the store on the table, walked out of Ms. Carr's office, and slammed the door.<sup>63</sup> *Id.*

Ms. Carr ran after her into the break room and asked Ms. Manning what she could do.<sup>64</sup> DSMF ¶ 62; PRDSMF ¶ 62. Ms. Carr wanted to find out if Ms. Manning was okay. *Id.* Ms. Carr also wanted Ms. Manning to calm down and reconsider her resignation and discuss other potential accommodations. *Id.* Ms. Manning would not discuss possible accommodations; instead, Ms. Manning told Ms. Carr that Ms. Carr was getting what she wanted from a long time ago. *Id.* Ms. Manning cleaned out her locker and left the building,<sup>65</sup> and has never returned to work at Kohl's.<sup>66</sup>

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<sup>63</sup> The EEOC interposed a qualified response to paragraph 61, denying the following statement: "As explained, all full-time associates are required to have open availability, which includes nights and week-ends, so that Kohl's can schedule them to the needs of the business." PRDSMF ¶ 61. The Court has already reviewed the parties' dispute over how to characterize the "requirement" of open availability for the purposes of summary judgment. *See, e.g., supra* notes 12, 13. The Court accepts the EEOC's denial of that statement.

The EEOC also denied that "Barnes asked Manning whether she was sure about resigning," and that she "slammed the door" upon leaving. The record citation supports Kohl's statement, and the EEOC provided only a general citation supporting its denial: "See Response to No. 58, and [PSAMF], incorporated herein." *Id.* This violates Local Rule 56. *See supra* note 31. Nonetheless, the Court reviewed the EEOC's "Response to No. 58" to determine whether the citation supported the EEOC's denial. The Court did not mine the entirety of Plaintiff's Amended Statement of Material Fact, "incorporated herein," for material supporting its position; to do so would be unfair to Kohl's and is far outside the boundaries of Local Rule 56. As the EEOC's qualified response as to those statements is unsupported by the record, the Court has not included the EEOC's qualification.

<sup>64</sup> The EEOC interposed a qualified response to Kohl's paragraph 62 but did not provide a record citation to support its position. PRDSMF ¶ 62. As Kohl's paragraph 62 is supported by its record citation and because the EEOC's qualified response violates Local Rule 56, the Court declines to include the EEOC's qualification. *See supra* note 31.

<sup>65</sup> Kohl's paragraph 63 stated: "From the time that Carr began the meeting with Manning on March 31, 2010, until the time Manning left the building, less than 15 minutes elapsed." DSMF ¶

*Id.* On April 2, 2010, Ms. Manning contacted the EEOC about filing a Charge of Discrimination. DSMF ¶ 64; PRDSMF ¶ 64. The EEOC asked Ms. Manning to complete a questionnaire regarding her potential claim. *Id.*

A few days after Ms. Manning resigned, Mr. Treichler asked Ms. Carr to contact Ms. Manning to give her an opportunity to return to work and engage in the interactive process.”<sup>67</sup> DSMF ¶ 65. On April 9, 2010, Ms. Carr called Ms. Manning and spoke with her on the phone. DSMF ¶ 66; PRDSMF ¶ 66. Ms. Carr asked Ms. Manning to reconsider her resignation, and to consider other possible accommodations for both full-time and part-time employment.<sup>68</sup> *Id.* Ms. Manning

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63. The EEOC denied this statement, asserting that “[r]ecords show the meeting began at 10:30 and Manning did not leave the building until 10:59.” PRDSMF ¶ 63. The EEOC’s statement is supported by the record citation (the citation itself—to “EEOC Exhibit 18”—contains what is apparently a typographical error; the Court has identified the supporting information as “EEOC Exhibit 20” and has considered that information), and viewing the facts in the light most favorable to the EEOC, the EEOC has generated a genuine dispute over the statement in paragraph 63. The Court declines to include paragraph 63.

<sup>66</sup> The EEOC’s paragraph 20 stated: “Manning spoke with Former Area Supervisor Wilner, within hours of leaving Kohl’s. Manning told Wilner she was shocked that Carr had totally denied there was anything that she could do to help her. Wilner testified that Manning “just wanted to have a work schedule. She loved her job. She wanted to be employed. She wanted to be healthy as well.” PSAMF ¶ 20. Kohl’s interposed a qualified response and objected to paragraph 205 as inadmissible hearsay not within a hearsay exception. DRPSAMF ¶ 20. The Court sustains Kohl’s objection because the out-of-court statements on which paragraph 20 is based are offered to prove “the truth of the matter asserted,” *see* FED. R. EVID. 801(c), and the statement does not fall within a hearsay exception. The Court excluded the EEOC’s paragraph 20.

<sup>67</sup> The EEOC denied paragraph 65, asserting that “Treichler asked Carr to contact Manning because Kohl’s had previously received other EEOC charges stemming from a similar situation. Treichler said he wanted to be able to ‘show’ that Kohl’s gave Manning the opportunity to return to work.” PRDSMF ¶ 65. Even though the EEOC’s assertion is supported by the record, *see Treichler Dep.* at 124:16-126:15, the EEOC denial goes to Mr. Treichler’s motives in doing what he did, not whether he did it. The Court has included Kohl’s paragraph 65.

<sup>68</sup> The EEOC interposed a qualified response to Kohl’s paragraph 66, admitting “that Carr called Manning on or about April 9” and “deny[ing] all other facts.” PRDSMF ¶ 66. After reviewing the record in the light most favorable to the EEOC, the Court has removed the following statements from paragraph 66: “Manning asked Carr if she could have the schedule set forth in the note from Dr. Brodsky (9 a.m. – 5:00 p.m. or 10:00 a.m. – 6:00 p.m.)”; and “Manning did not have any further discussion with Carr, but said that she would think about it, and call Carr that week-end.” The record contains a genuine dispute as to these statements. *See* DSMF Attach 24 *Dr. Bourne/Manning Exam Transcript* at 143:13-143:22 (ECF No. 72-24).

asked Ms. Carr about her schedule, and Ms. Carr told Ms. Manning that they would have to consult with Kohl's corporate office about any and all potential accommodations. *Id.* After this conversation, Ms. Manning did not call Ms. Carr or anyone else in management at Kohl's to discuss her continued employment with Kohl's or possible accommodations.<sup>69</sup> DSMF ¶ 67; PRDSMF ¶ 67. Kohl's considered Ms. Manning to have voluntarily resigned from her employment after she had not contacted Ms. Carr or anyone else in management to discuss her continued employment with Kohl's.<sup>70</sup> DSMF ¶ 69; PRDSMF ¶ 69. Ms. Manning was not

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The Court does not accept the EEOC's denial as to the remaining statements in paragraph 66. As to the statement that "Carr told Manning they would have to consult with Kohl's corporate office about any and all potential accommodations," the EEOC essentially admitted this fact in its response by saying "Carr told [Ms. Manning] that any requests for a scheduling accommodation had to be approved by corporate." DSMF ¶ 66; PRDSMF ¶ 66. Next, the EEOC's record citation does not create a genuine dispute of material fact as to the statement that "Carr also asked Ms. Manning to consider other possible accommodations . . . including both full-time and part-time employment." *Id.*; *compare Carr Aff.* ¶ 36 ("I also asked Manning to consider other possible accommodations . . . including both full-time and part-time employment"), *with Manning Dep.* at 134:14-134:17 ("Q. Did Tricia ask you to consider accommodations for both full-time and part-time positions? A. She told me to think about it and I said: Well, what about my schedule?").

<sup>69</sup> The Court modified paragraph 67 to be consistent with the Court's acceptance of the EEOC's qualification to paragraph 66. *See supra* note 68. The Court omits the following statement: "Manning did not call Carr that week-end." DSMF ¶ 67; PRDSMF ¶ 67.

Kohl's paragraph 68 stated: "Manning did not call Carr or anyone else at Kohl's about returning to work or possible accommodations because the EEOC instructed her not to speak with anyone from Kohl's about these issues." DSMF ¶ 68. The EEOC denied paragraph 68, stating that "Manning did not call Carr back because Carr did not say anything . . . to suggest that Kohl's had reconsidered its denial of her request for a stable schedule," and that "[e]ven if Manning is correct that someone at EEOC told her not to contact Carr, without any context or timeframe, it cannot be tied to the April 9 conversation." PRDSMF ¶ 68. Viewing the facts in the light most favorable to the EEOC, the Court accepts the EEOC's denial of paragraph 68 because there is a genuine dispute of material fact as to the factors contributing to Ms. Manning's decision not to contact Kohl's after April 9, 2010.

<sup>70</sup> The EEOC denied Kohl's paragraph 69, arguing that "Kohl's constructively discharged Manning on March 31, 2010 when it denied her request for a reasonable accommodation. The day after the March 31, 2010 meeting, Carr advised St. John that Manning was no longer with Kohl's. Carr told him that Manning had requested a set schedule, that Kohl's could not comply with the request, and 'that it had been approved through corporate that that was the direction that we were going in.' Either that day or the next, Manning was removed from the payroll and the schedule." PRDSMF ¶ 69. The EEOC's argument is unsupported by the record citation. *See* PRDSMF Attach 3 *St. John Dep.* at 172:23-173:3 (ECF No. 78-3). Therefore, the Court declines to accept the EEOC's denial.

terminated as an associate in Kohl's system until sometime in April 2010. *Id.* Upon Ms. Manning's departure, Kohl's assigned her duties in the beauty department to part-time associates supervised by Ms. Barnes.<sup>71</sup> PSAMF ¶ 12; DRPSAMF ¶ 12.

#### 4. Other Information About Ms. Manning's Health

On June 15, 2010, Ms. Manning's doctor concluded that she was unable to work.<sup>72</sup> DSMF ¶ 70; PRDSMF ¶ 70. Ms. Manning has not been able to work since that time. *Id.* According to Ms. Manning, her diabetes has not deteriorated since she resigned from her employment with Kohl's—it has remained the same. *Id.* DSMF ¶ 32; PRDSMF ¶ 32. Her blood sugar levels go up and down and her diabetes is uncontrollable. DSMF ¶ 70; PRDSMF ¶ 70. Since resigning from her employment with Kohl's, regular sleep patterns and mealtimes have not regulated Ms. Manning's diabetes; according to Ms. Manning, she is never going to be able to regulate her diabetes.<sup>73</sup> *Id.* Additionally, even though she struggles with diabetes,

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<sup>71</sup> Kohl's denied the EEOC's paragraph 12. Kohl's contended that the EEOC's paragraph 12 mischaracterized the cited deposition testimony. The Court modified the language in paragraph 12 to reflect the deposition testimony and deems the paragraph as altered admitted.

<sup>72</sup> The EEOC interposed a qualified response to paragraph 70. However, the response did not contain a record citation and it did not explain how or why Kohl's statements are incorrect except providing a general denial along with unsupported additional information. Kohl's record citation supports paragraph 70. As the EEOC's general citation violates Local Rule 56, the Court has not included the EEOC's qualification. *See supra* note 31.

<sup>73</sup> Kohl's paragraph 31 stated: "Even if given the perfect work schedule, Manning would still struggle with working because Manning's diabetes cannot be controlled with a regular sleep schedule and regular mealtimes." DSMF ¶ 31. The EEOC denies this statement because "[i]n Dr. Brodsky's opinion, different work schedules could make a difference for Manning." PRDSMF ¶ 31. After reviewing the record citation and viewing the facts in the light most favorable to the EEOC, the Court excluded paragraph 31 because the EEOC provided evidence that Ms. Manning's diabetes could be controlled to a greater extent than suggested in paragraph 31.

Kohl's paragraph 71 repeats the statement made in paragraph 31. DSMF ¶ 31; PRDSMF ¶ 31. The Court denies paragraph 71 for the same reasons.

Ms. Manning drinks alcohol on a regular basis, against the advice of her primary care physician.<sup>74</sup>

## II. THE PARTIES' POSITIONS

### A. Kohl's Motion

Kohl's argues that Ms. Manning failed to cooperate in the “the interactive process” between employer and employee, and that this is “fatal to the EEOC's failure to accommodate claim.” *Def.'s Mot.* at 6-9. Even if the Court finds that there was no failure to cooperate, Kohl's argues that the EEOC cannot establish three elements of the prima facie test for a failure to accommodate claim. *Id.* at 6 n.5, 10-21. Kohl's submits that the EEOC cannot prove that Ms. Manning could perform the essential functions of her job, with or without a reasonable accommodation. *Id.* at 10-16. According to Kohl's, Ms. Manning's requested accommodation—which it asserts was specifically limited to a 9:00 a.m. to 6.00 p.m. day shift—was unreasonable as a matter of law for two reasons: (1) “having open availability and a flexible work schedule was an essential function of Manning's position”; and alternatively (2) Ms. Manning's requested accommodation would not have permitted her to regulate her diabetes, and therefore the request “was unreasonable because it would not have been successful.” *Id.* at 11-16.

Moreover, Kohl's maintains that it took no adverse employment action against Ms. Manning—here, a constructive discharge—because “the conduct that Manning complains of . . . was not sufficiently severe or pervasive to alter the terms

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<sup>74</sup> The EEOC interposed a qualified response to paragraph 32 but did not dispute any of the statements in that paragraph. PRDSMF ¶ 32. The Court includes the paragraph.

or conditions of her employment” and because “a reasonable employee, in the same situation, would not have felt compelled to resign.” *Id.* at 20-21. Finally, Kohl’s contends that the constructive discharge claim must fail because there is no “evidence of discriminatory animus.” *Id.* at 21. Kohl’s also maintains that the store cannot be held liable for punitive damages because good-faith efforts were made “to comply with the requirements of the ADA, which absolves Kohl’s of liability for punitive damages in this case.” *Id.* at 24.

### **B. The EEOC’s Opposition**

In response, the EEOC insists that “numerous factual disputes” remain, precluding summary judgment. *Pl.’s Opp’n* at 9. First, with respect to “essential job functions,” the EEOC argues there is conflicting evidence as to Ms. Manning’s responsibilities at the time of her termination. *Id.* at 9. “[T]hus, by definition, there is conflicting evidence about whether Manning could perform the essential functions of her job with or without accommodation. *Id.*

Next, the EEOC argues that “Kohl’s is unable to satisfy its burden of showing that these so-called requirements [of open availability and working certain nights and weekends] are essential job functions.” *Id.* at 12-13. To support this assertion, the EEOC submits that Kohl’s “does not have any written policies, rules, or guidelines for implementing the requirement[s].”<sup>75</sup> *Id.* at 13. Even if Kohl’s

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<sup>75</sup> The EEOC also argues that Kohl’s offers no support for its assertion that the requirements are standard practice in the retail industry. *Pl.’s Opp’n* at 13-14. The EEOC also looks to Kohl’s employee handbook, referencing a section that “explains that work schedules are based on ‘availability and workload.’” *Id.* at 14. Finally, the EEOC references store records and the testimony of two employees “show[ing] that it accommodated the scheduling needs of many” employees at the Westbrook store, including full-time associates, “for various miscellaneous personal reasons.” *Id.* at 15.

consistently applied its open availability policy, the EEOC argues that First Circuit case law supports the proposition that, under the ADA, an employer cannot impose per se rules regarding the reasonableness of workplace accommodations. *Id.* at 17 (citing *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647 (1st Cir. 2000)).

With respect to the reasonableness of Ms. Manning’s request for a modified work schedule, the EEOC contends her request “for a more regular and predictable work schedule was reasonable and it would have allowed her to perform the essential functions of her job.” *Id.* at 16. The EEOC insists that summary judgment would be inappropriate because Kohl’s relied on “clearly disputed facts” in arguing that the accommodation was unreasonable, such as whether Ms. Manning demanded a “purely Monday-through-Friday” schedule or insisted upon “the exact hours of 9:00 to 5:00 or 10:00 to 6:00.” *Id.* Furthermore, the EEOC disputes that “Manning is [ ] required to show that a regular work schedule would have regulated or cured her diabetes, as suggested by Defendant.” *Id.* at 17. Instead, the EEOC argues the question is whether Ms. Manning would have been able to perform her job functions under the proposed accommodation, and the conclusion that she could have continued to perform her job is supported by the “previous three and a half years of [ ] employment with Kohl’s” as well as testimony by her physician. *Id.*

Moreover, the EEOC asserts that because Kohl’s failed to make reasonable accommodations, it is the store’s burden to show that Ms. Manning’s requested accommodation would have been an “undue hardship.” *Id.* at 19. They insist that

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None of these propositions is supported by the underlying facts to which the parties have made reference in the statements of material fact. Accordingly, the Court has not considered this part of the EEOC’s argument. *See infra* Section III.B.

Kohl's "circular reason[ing] that it 'knew that we could not just do day shifts' for Manning" is "generalized and insufficient" to sustain this burden. *Id.* at 20-21.

The EEOC next argues that Kohl's denial of Ms. Manning's request for a modified schedule caused her constructive discharge and that "it is the factfinder who should make this fact intensive determination." *Id.* at 27. The EEOC rejects Kohl's argument that Ms. Manning failed to engage in an "interactive process," putting forth her actions including that "Manning raised the need for an accommodation with at least two supervisors, she promptly brought in the medical documentation requested, and she met with her manager and supervisor when they were ready to discuss her request." *Id.* at 23. Instead, the EEOC claims, it is Kohl's actions that caused the interactive process to fail. *Id.* at 19-24.

Finally, the EEOC asserts that failure to provide Ms. Manning with a reasonable accommodation violates the ADA regardless of Kohl's motivation in denying the request, and that there is sufficient evidence for a fact-finder to decide whether Kohl's is liable for punitive damages. *Id.* at 28-29.

### **C. Kohl's Reply**

In reply, Kohl's reasserts that it is entitled to summary judgment on a variety of independent grounds. *Def.'s Reply* at 2. First, Kohl's maintains that Kohl's could not have failed to provide Ms. Manning with a reasonable accommodation, because Ms. Manning herself failed to engage in the interactive process that is a predicate to a failure to accommodate claim. *Id.* at 2-5. Next, Kohl's argues the EEOC cannot prove that any type of accommodation would have

enabled Ms. Manning to perform the essential functions of her job because she was unable to work at all. *Id.* at 6-7. Moreover, Kohl’s argues Ms. Manning was unable to perform the essential functions of her job for the independent reasoning that open availability was an essential function that could not be accommodated. *Id.* at 7-10. Relatedly, Kohl’s contends that the EEOC cannot prove Ms. Manning’s proposed accommodation was reasonable because “creating a new job that will meet the employee’s medical restrictions is not a reasonable modification.” *Id.* at 11-13. Finally, Kohl’s asserts that “in order for a resignation to constitute a constructive discharge, it effectively must be void of choice or free will,” and that under this standard its actions with respect to Ms. Manning do not constitute a constructive discharge. *Id.* at 13-14.

### **III. DISCUSSION**

#### **A. Summary Judgment Standard**

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). A fact is “material” if it “has the potential to change the outcome of the suit.” *Tropigas de Puerto Rico, Inc. v. Certain Underwriters at Lloyd’s of London*, 637 F.3d 53, 56 (1st Cir. 2011) (quoting *McCarthy v. Nw. Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)). A dispute is “genuine” if “a reasonable jury could resolve the point in favor of the nonmoving party.” *Id.* (quoting *McCarthy*, 56 F.3d at 315).

Once this evidence is supplied by the moving party, the nonmovant must “produce ‘specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.’” *Triangle Trading Co., Inc. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (quoting *Morris v. Gov’t Dev. Bank of Puerto Rico*, 27 F.3d 746, 748 (1st Cir. 1994)). In other words, the non-moving party must “present ‘enough competent evidence’ to enable a factfinder to decide in its favor on the disputed claims.” *Carroll v. Xerox Corp.*, 294 F.3d 231, 237 (1st Cir. 2002) (quoting *Goldman v. First Nat’l Bank of Boston*, 985 F.2d 1113, 1116 (1st Cir. 1993)).

The Court then “views the facts and draws all reasonable inferences in favor of the nonmoving party.” *Ophthalmic Surgeons, Ltd. v. Paychex, Inc.*, 632 F.3d 31, 35 (1st Cir. 2011). However, the Court “afford[s] no evidentiary weight to ‘conclusory allegations, empty rhetoric, unsupported speculation, or evidence which, in the aggregate, is less than significantly probative.’” *Tropigas*, 637 F.3d at 56 (quoting *Rogan v. City of Boston*, 267 F.3d 24, 27 (1st Cir. 2001)); accord *Sutcliffe v. Epping Sch. Dist.*, 584 F.3d 314, 325 (1st Cir. 2009).

## **B. Facts Properly Considered on Summary Judgment**

The EEOC’s response to Kohl’s motion supports its legal arguments, in part, with factual assertions raised only in its opposition to Kohl’s statement of material facts (PRDSMF). *See, e.g., Pl.’s Opp’n* at 14 (“St. John testified that exceptions were ‘pretty regularly’ made to the scheduling rules and not necessarily documented. [PRDSMF] ¶15”). The EEOC is not entitled to rely on facts raised in its opposition to Kohl’s statement of material facts; those assertions only support the EEOC’s

denial or qualification of Kohl's statements of fact. Local Rule 56(f) provides that "[t]he Court shall have no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of facts." The EEOC's "separate statement of facts"—the proper set of facts submitted by the EEOC—is its additional statement of material facts (PSAMF). *See* D. ME. LOC. R. 56(c). Those facts are set out in the Statement of Facts section of this opinion, and have been admitted (except for those properly controverted by Kohl's). *See, e.g., supra* note 66.

In this case, Local Rule 56 serves more than a technical-procedural function; equitable considerations particular to this case lead to the conclusion that Local Rule 56(c) and 56(f) should be enforced.<sup>76</sup> After the EEOC submitted its opposition to Kohl's statement of material facts, Kohl's moved for leave to respond to the additional facts raised in the EEOC's opposition, and in the alternative requested that the EEOC "not be allowed to rely on any additional facts not contained in [PSAMF]." *Def.'s Mot. for Leave to Respond to Additional Facts Raised in Pl.'s Opp'n to Def.'s Statement of Material Facts* (ECF No. 93). The EEOC opposed Kohl's motion, but it only discussed the first ground—arguing that Kohl's is not entitled to "rebut all the factual statements and evidence presented by an opposing party to show that a material fact is generally disputed." *Pl. EEOC's Resp. to Def.'s Mot. for*

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<sup>76</sup> The Court has the discretion to consider the facts supported by a record citation in the EEOC's opposing statement; the local rule does not mandate that facts properly raised in each party's statement of material facts are the only facts a court may consider. D. ME. LOC. R. 56(f); *see* FED. R. CIV. P. 56(c)(3) ("The court need consider only the cited materials, but it may consider other materials in the record"). In exercising its discretion, the Court declines to consider those facts in this case.

*Leave to Respond to Additional Facts Raised in Pl.'s Opp'n to Def.'s Statement of Material Facts* (ECF No. 101).

Thus, in support of its argument that Kohl's should not be allowed to respond, the EEOC argued that "Local Rule 56(d) gives each party one [and only one] opportunity to support or oppose material facts which the opposing party claims cannot be genuinely disputed." *Id.* at 3. Accepting the EEOC's own logic, the Court should not consider facts the EEOC raised only in its opposition to Kohl's statement of facts, because Kohl's was never provided an "opportunity to support or oppose" those facts. Finally, the Magistrate Judge issued an order on the motion, denying Kohl's request to respond to the additional facts, but also explaining that Kohl's response would be unnecessary: "[T]he plaintiff may not rely in its opposition to the motion for summary judgment on factual assertions that are not included in the plaintiff's separate statement of material facts in dispute. Accordingly, the defendant's request to further respond is denied as unnecessary." *Order Denying Mot. for Leave to Respond to Additional Facts* (ECF. No. 102).

The Court declines to allow the EEOC to have it both ways and will not consider facts the EEOC posited only in its objections to Kohl's statement of material facts.

### **C. Disability Discrimination under the ADA**

The EEOC claims that Kohl's violated the ADA because: (1) it failed to accommodate Ms. Manning's disability; and (2) because it constructively terminated Ms. Manning. *Pl.'s Opp'n* at 2; *Compl.* Title I of the ADA prohibits discrimination

“against a qualified individual on the basis of disability in regard to . . . the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a); *see Richardson v. Friendly Ice Cream Corp.*, 594 F.3d 69, 75 (1st Cir. 2010). Under the ADA, the term “discriminate” includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless the accommodation would impose an undue hardship on the operation of the business.” *Id.* § 12112(b)(5)(A); *see Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999).

### 1. Failure to Accommodate Claim

A plaintiff in a failure to accommodate case has the burden of proving the following prima facie elements by a preponderance of the evidence: (1) that the individual was disabled within the meaning of the ADA; (2) that the individual was qualified to perform the essential functions of his job with or without a reasonable accommodation; (3) and that the employer knew of the disability and did not reasonably accommodate it.<sup>77</sup> *Freadman v. Metropolitan Property and Cas. Ins. Co.*, 484 F.3d 91, 102 (1st Cir. 2007); *Carroll*, 294 F.3d at 237 (citing *Higgins*, 194 F.3d at 264); *see also Jones v. Nationwide Life Ins. Co.*, 696 F.3d 78, 86-89 (1st Cir. 2012).

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<sup>77</sup> Kohl’s states that the prima facie case includes the element that “any action taken against Manning was because of her disability.” *Def.’s Mot.* at 10. This causation element, however, is not needed on the failure to accommodate claim. *Freadman*, 484 F.3d at 102; *Carroll*, 294 F.3d at 237; *Higgins*, 194 F.3d at 264 (“an employer who knows of a disability yet fails to make reasonable accommodations violates the statute, no matter what its intent, unless it can show that the proposed accommodations would create undue hardship”); *see also Boutin v. Home Depot U.S.A., Inc.*, 490 F. Supp. 2d 98, 104 (D. Mass. 2007). The “because of” element is a proper consideration for constructive discharge. *See infra* Section III.C.2.

**a. Threshold Inquiry:<sup>78</sup> Whether Open Availability was an Essential Function of Ms. Manning’s Position**

Kohl’s argues that having “open availability and a flexible work schedule was an essential function”<sup>79</sup> of Ms. Manning’s position as a full-time sales associate at Kohl’s. If Kohl’s is correct, it would prove fatal to the EEOC’s lawsuit because “the law does not require an employer to accommodate a disability by foregoing an essential function of the position.” *Mulloy v. Acushnet Co.*, 460 F.3d 141, 153 (1st Cir. 2006) (quoting *Kvorjak v. Maine*, 259 F.3d 48, 57 (1st Cir. 2001)). In other words, as Ms. Manning was unable to maintain open availability, if open availability was an essential function of Ms. Manning’s job, she could not—as a matter of law—have performed the essential functions of her position even with a reasonable accommodation.

However, simply because an employer says that a component of a job is an essential function does not make it so. *Richardson*, 594 F.3d at 79 n.7 (“The question of whether a particular job function is essential is for the jury when there is sufficient evidence”). In the context of a motion for summary judgment, the question turns to whether there is a genuine dispute of material fact as to whether open availability was an essential function of Ms. Manning’s job at Kohl’s. An essential function is a “fundamental job duty of the position at issue,” which “does

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<sup>78</sup> Kohl’s does not dispute that Ms. Manning was “disabled” under the ADA due to her diabetes. See *Def.’s Mot.* at 6 n.5, 10.

<sup>79</sup> The EEOC stated that open availability is “the ability to work any time of the day or night as needed by the business and ‘to have the availability wide open to include days, mids, nights, closes and everything in between.’” See *Pl.’s Opp’n* at 12 (quoting *Def.’s Mot.* at 10-14). The Court accepts this definition for the purposes of determining whether “open availability” was an essential function because it is supported by the record. See PSAMF ¶ 16.

not include marginal tasks.” 29 C.F.R. § 1630.2(n)(1); *Jones*, 696 F.3d at 88 (quoting *Kvorjak*, 259 F.3d at 55) (internal quotations omitted). Evidence of whether a particular function is essential includes, but is not limited to: “the employer’s judgment, written job descriptions, the work experience of past incumbents of the job, and the current work experience of incumbents in similar jobs.” *Mulloy*, 460 F.3d at 147 (citing 29 C.F.R. § 1630.2(n)(3)). A court must give a “significant degree” of deference to an employer’s business judgment about the necessities of a job. *Jones*, 696 F.3d at 88.

The First Circuit has made “equally clear, however, that the employer’s good-faith view of what a job entails, though important, is not dispositive.” *Id.* (quoting *Gillen v. Fallon Ambulance Services, Inc.*, 283 F.3d 11, 25 (1st Cir. 2002)). “In the final analysis, the complex question of what constitutes an essential job function involves fact-sensitive considerations and must be determined on a case-by-case basis.” *Gillen*, 283 F.3d at 25. *Gillen* is instructive. There, a woman with an amputated arm applied to be an emergency medical technician (EMT), but the prospective employer declined to hire her after concluding that she could not perform a two-handed lift of seventy pounds or more, based upon medical evaluations. *Id.* at 16-20. A hospital that “was in the process of helping [the employer] establish a compendium of the physical attributes required for doing EMT work” had produced a list of “essential functions [that was] intended for use as a baseline by physicians who examined candidates for vacant EMT positions.” *Id.* at 19. Appearing both on this list and in another part of the compendium entitled

“minimal job requirements” was a requirement of “[l]ifting with two hands individually up to seventy pounds.” *Id.* The woman filed a disability discrimination lawsuit, and in its answer, the employer identified the plaintiff’s “inability to perform two-handed lifts as ‘the sole reason’ why she was not hired.” *Id.* The district court granted summary judgment, including on the ground that the plaintiff “was not qualified for the position when she applied to FAS because she was unable to lift sufficient weight to enable her to perform essential job functions.” *Id.* at 20.

The First Circuit reversed. The *Gillen* Court elaborated on how to weigh the employer’s view, stating that “a court should give consideration to what an employer deems essential, but also should take care to ensure that such functions are essential in fact.” *Id.* Since the record reflected that the employer “did not routinely screen prospective employees to confirm their ability to lift,” that the examining physician “had tested the ability to lift only on rare occasions in connection with his work for [the employer], and that he was not aware of any firm lifting requirement at the time that he examined the appellant,” the *Gillen* Court found that the evidence did not support the conclusion that lifting seventy pounds was an essential function of the EMT position as a matter of law. *Id.* at 27. The First Circuit concluded that “indulging all reasonable inferences in the appellant’s favor, a rational factfinder could conclude that the appellant was qualified for the EMT position at the time she sought employment with [the employer].” *Id.* at 28.

Based upon the guidance in *Gillen*, the record here prevents this Court from finding on summary judgment that, as a matter of law, having open availability—

the ability to work any time of the day or night as needed by Kohl's and to have the availability wide open to include "days, mids, nights, closes and everything in between"—was an essential function of Ms. Manning's position as a full-time associate. Although there is evidence that Kohl's considered its open availability policy important, a reasonable fact-finder could find otherwise, because there is scant, if any, evidence confirming that the policy was, in fact, an essential function. *See Gillen*, 283 F.3d at 27; *see also Ward v. Mass. Health Research Institute, Inc.*, 209 F.3d 29, 35 (1st Cir. 2000) (reversing summary judgment because, *inter alia*, "a reasonable factfinder could conclude that a regular and predictable schedule is not an essential function of [plaintiff's] position"); *Rooney v. Sprague Energy Corp.*, 483 F. Supp. 2d 43, 50-54 (D. Me. 2007).

Significantly, there is no evidence that Kohl's considered the cost of waiving the open availability requirement in Ms. Manning's case. PSAMF ¶ 19; *cf. Gillen*, 283 F.3d at 28 ("When an employer proves that it has gone through a deliberative process or has mustered evidence of judgments of public health officials, that evidence may undercut any argument that the . . . decision [was based on] plaintiff's proficiency in a marginal function"). Kohl's argues that "[w]ithout exception, all of the witnesses in this matter have testified that full-time sales associates are required to have open availability," but the EEOC has properly controverted Kohl's supporting citation. *See supra* note 12 (declining to admit Kohl's paragraph 16). Furthermore, during Ms. Manning's time as Beauty Specialist—which was a full-time sales associate position—Ms. Manning was often scheduled to work between

9:00 a.m. and 7:00 p.m., and only occasionally at night. DSMF ¶ 37. Although that is not the position that Ms. Manning held at the time of the events in question, it cuts against Kohl's argument that "Kohl's consistently considered open availability and a flexible work schedule to be an essential job function for all of its full-time associates." *Def.'s Mot.* at 12.

The Court concludes that whether Kohl's open availability policy was an essential or marginal function remains a genuinely disputed question of material fact. Summary judgment is not appropriate on this issue.

#### **b. Qualified Individual**

The EEOC has the burden of showing that Ms. Manning was qualified to perform the essential elements of her job with or without a reasonable accommodation. *See Tobin v. Liberty Mut. Ins. Co.*, 553 F.3d 121, 136 (1st Cir. 2009) (citing 42 U.S.C. § 12112(b)(5)(A)). In other words, the EEOC must show both that (1) Ms. Manning would have been capable of performing the essential elements of her job<sup>80</sup> had she continued working and been afforded her proposed accommodation, and (2) that the proposed accommodation was "reasonable." To address whether Ms. Manning could have, with her proposed accommodation, performed the essential functions of her job, the Court must define what that accommodation would have been. Kohl's argues that the requested accommodation was "a predictable day shift between the hours of 9:00 a.m. and 6:00 p.m.," including work on weekends. *Def.'s Reply* at 11. The EEOC contends that "[a] fact

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<sup>80</sup> This section assumes that open availability was not an essential element of Ms. Manning's job. *See supra* Section III.C.1.a.

finder could also conclude that Manning requested a more regular and predictable schedule and she was willing to work between the hours of 6:00 a.m. and 8:00 p.m.” *Pl.’s Opp’n* at 17.

As the facts must be viewed in the light most favorable to the EEOC, the Court finds the EEOC’s contention—that Ms. Manning was willing to work more expansive hours than 9:00 a.m. to 6:00 p.m.—supported by the record. The letter from Ms. Manning’s physician that she gave Kohl’s proposed 9:00 a.m. to 5:00 p.m. and 10:00 a.m. to 6:00 p.m.—in parentheses—as examples of an acceptable schedule; the physician’s letter was not a demand limited to those hours. PSAMF ¶ 14; *see supra* note 48. As the EEOC points out, Dr. Brodsky’s letter focused specifically on swing shifts: “working [a] late shift one day and returning for an early shift the next day”; these shifts were when she had “difficulty matching her insulin action to her work schedule.” DSMF ¶ 51; *Pl.’s Opp’n* at 16. Based on this observation, Dr. Brodsky wrote “[a] more predictable and regular schedule should help smooth her blood sugar and help prevent serious complication of the diabetes.” *Id.* Similarly, Ms. Carr documented that Ms. Manning “stated she did not understand why she could not have a more consistent day-to-day schedule,” a phrasing that is quite general. PSAMF ¶ 22. From this information, a reasonable fact-finder could infer that Ms. Manning’s request for a “more regular and predictable schedule” referred to a window of time more expansive than 9:00 a.m. to 6:00 p.m., and the Court proceeds on the premise that Ms. Manning’s request encompassed working hours of 6:00 a.m. to 8:00 p.m.

The next issue is whether Ms. Manning could have performed the essential functions of her job, with her proposed accommodation. *See Jones*, 696 F.3d at 90 (“One element in the reasonableness equation is the likelihood of success”) (quoting *Evans v. Fed. Express Corp.*, 133 F.3d 137, 140 (1st Cir. 1998)). Kohl’s argues that “even if [Ms. Manning] had the perfect work schedule, she would not be able to work,” and that “[a]ccordingly, as a matter of law and logic, Manning’s requested accommodation was unreasonable because it would not have been successful.” *Def.’s Mot.* at 16. The EEOC responds, in part, by correctly pointing out that the EEOC “is not required to show that a regular work schedule would have regulated or cured her diabetes [but instead] whether the proposed accommodation would have allowed Manning to perform her job functions.” *Pl.’s Opp’n* at 17. On this basis, it argues that Ms. Manning’s three and a half years of working successfully at Kohl’s is the best evidence that she could have performed her job functions. *Id.*

Employed as a full-time sales associate in the Beauty Department from January 2008 through January 2010, DSMF ¶¶ 36, 44, Ms. Manning often worked between 9:00 a.m. and 7:00 p.m. DSMF ¶ 37. During this time, Ms. Manning had no issues with her work schedule and was able to perform all of her job duties. DSMF ¶¶ 39, 42. In fact, she received good performance evaluations and pay raises in both 2008 and 2009. DSMF ¶¶ 74-75. During that time, she even worked every other weekend. DSMF ¶ 37. Viewed in combination with record evidence suggesting that Ms. Manning’s condition has not deteriorated since she resigned from Kohl’s, and “has been the same,” DSMF ¶ 70, this evidence supports the

EEOC's contention that Ms. Manning could have performed her job functions under the proposed schedule modification. These facts differentiate Ms. Manning's situation from that in *Evans v. Fed. Express Corp.*, where the First Circuit held that an employer was not required to retain the plaintiff while he underwent a second round of treatment for a covered disability, after his first round of treatment ended in failure. 133 F.3d at 140; see *Jones*, 696 F.3d at 91. Ms. Manning's past experience suggests the opposite. In short, a reasonable fact-finder could conclude that Ms. Manning would have been able to successfully perform her job functions as a full-time sales associate with her proposed schedule modification.

The EEOC must also show that Ms. Manning's proposed accommodation was reasonable. The First Circuit has stated that "in order to show a proposed accommodation is reasonable, a plaintiff must demonstrate that it would enable [her] to perform the essential functions of [her] job and would be feasible for the employer under the circumstances." *Jones*, 696 F.3d at 90 (internal quotations and citations omitted). This inquiry overlaps with the essential functions inquiry: if a fact-finder determined that open availability was an essential function of Ms. Manning's job, Ms. Manning's proposed accommodation—a predictable schedule—would be per se unreasonable. *Mulloy*, 460 F.3d at 153 ("It is well established that, while a reasonable accommodation may include job restructuring, 'the law does not require an employer to accommodate a disability by foregoing an essential function of the position'") (quoting *Kvorjak*, 259 F.3d at 59) (internal citation omitted). Since whether open availability was an essential function is for the fact-finder, the Court

may not conclude that Ms. Manning’s proposed accommodation was unreasonable as a matter of law. *See Ward*, 209 F.3d at 33 (“Our inquiry is somewhat complicated by the interrelationship between the terms ‘essential function’ and ‘reasonable accommodation’”).

However, in addition to enabling an employee to perform the essential functions of her job, in order to be “reasonable,” a proposed modification must also be feasible for the employer under the circumstances. *Jones*, 696 F.3d at 90. In discussing “reasonable accommodation” under 42 U.S.C. § 12112(b)(5)(A), the Supreme Court shed light on the legal standard by summarizing and approving the holdings of several federal appellate courts: “a plaintiff/employee (to defeat a defendant/employer’s motion for summary judgment) need only show that an ‘accommodation’ seems reasonable on its face, *i.e.*, ordinarily or in the run of cases.” *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002) (citing *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001)). The ADA itself explicitly states that a “modified work schedule[]” may be a reasonable accommodation. 42 U.S.C. § 12111(9); *Ward*, 209 F.3d at 36.

In this case, Ms. Manning’s past work schedule at Kohl’s supports the proposition that it would have been feasible for Kohl’s to allow one of its eleven full-time sales associate to work a regular schedule: as a Beauty Specialist, Ms. Manning often worked between 9:00 a.m. and 7:00 p.m. and only “occasionally” worked nights. DSMF ¶¶ 6, 37. In addition, Mr. Treichler wrote in an email that Kohl’s was willing to provide Ms. Manning with a schedule that avoided swing

shifts. PSAMF ¶ 9. Also, there is little evidence that Kohl's would have been burdened by accommodating Ms. Manning's request—besides bare assertions made by Kohl's employees that such an accommodation would not have been possible—and, as noted earlier, Kohl's did not consider the cost of accommodating Ms. Manning. PSAMF ¶ 19. The Court concludes that the EEOC has generated a genuine dispute of material fact as to whether Ms. Manning's proposed modification was feasible for Kohl's, and that the larger reasonableness inquiry is also a disputed question of material fact. *See Barnett*, 535 U.S. at 401; *Jones*, 696 F.3d at 90.

Summary judgment is not appropriate on this issue, as whether Ms. Manning was qualified to perform the essential elements of her job with or without a reasonable accommodation remains a genuinely disputed question of material fact.

**c. Failure to Engage in the Interactive Process**

Kohl's argues that Ms. Manning “utterly failed to engage in the required interactive process despite numerous opportunities to do so,” and that this failure is fatal to the EEOC's failure to accommodate claim. *Def.'s Mot.* at 6-9. Kohl's notes that the First Circuit and other federal courts “have held that an employee who fails to engage in the interactive process, or causes a breakdown in the interactive process, cannot state a failure to accommodate claim under the ADA.” *Id.* at 6-7.

EEOC regulations that implement the ADA “do not mandate that an employer provide an interactive process.” *Phelps v. Optima Health, Inc.*, 251 F.3d 21, 27 (1st Cir. 2001). However, the regulations “suggest that ‘it may be necessary for the covered entity to initiate an informal, interactive process with the qualified

individual.” *Id.* (quoting 29 C.F.R. § 1630.2(o)(3)). The First Circuit has held that the duty to engage in an interactive process is not one-sided; the duty falls on both the employer and employee. *Id.*

*Phelps* is instructive. After the employer dismissed the employee from its rehabilitation unit because her back problems prohibited her from performing the essential functions of a clinical nurse position, the employee met with the employer’s human resources officer, received information about the application process for an internal transfer to a new position and was made aware that the human resources officer had offered to help her find work compatible with her physical limitations. *Id.* at 24. In *Phelps*, the employee conceded that “it was she who failed to cooperate in such a process.” The First Circuit explained:

Evidence of the details of Phelps’s post-dismissal conversations with human resources personnel confirms that Phelps was not actively engaged in the interactive process: she turned down several job opportunities suggested by [human resources] and placed significant conditions on her reassignment severely limiting [her employer’s] flexibility. Moreover, the evidence indicates that [the employer] offered Phelps several potential alternatives, began the interactive process immediately upon Phelps’s dismissal, returned her phone calls and letters promptly, and generally acted in good faith.

*Id.* The First Circuit concluded that in these circumstances, it could not find that the “lack of success of the interactive process in this case creates any liability under the ADA.” *Id.* The *Phelps* Court quoted with apparent approval a Seventh Circuit case:

Liability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown. But where, as here, the employer does not obstruct the process, but instead makes reasonable efforts both to communicate with the employee and

provide accommodations based on the information it possessed, ADA liability simply does not follow.

*Id.* at 28 (quoting *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1137 (7th Cir. 1996)).

Here, in March 2010, Ms. Manning informed Ms. Barnes, the Assistant Store Manager, that she was having problems working her scheduled hours, that her difficulties were related to her diabetes, and that she needed a steady schedule.<sup>81</sup> Ms. Barnes asked Ms. Manning for a doctor's note to support her request. The doctor indicated that Ms. Manning was anxious and stressed and that the stress was causing high glucose levels. He asked that Ms. Manning be allowed to work "a predictable day shift" and gave examples of 9:00 to 5:00 or 10:00 to 6:00. After Ms. Carr reviewed the doctor's note, she received advice from Mr. Treichler, the Territory Resources Manager, as to how to proceed. Mr. Treichler said that Kohl's could avoid requiring Ms. Manning to work so-called swing shifts, but he said that she would have to be able to work nights. He asked Ms. Carr to "speak with [Ms. Manning] about this option."

When Ms. Carr and Ms. Barnes met with Ms. Manning, Kohl's management told Ms. Manning that it could not schedule her to work a steady 9:00 to 5:00 or 10:00 to 6:00. They informed Ms. Manning that she would have to work shifts that are early, including days, so-called mids, and closes. As noted earlier, Ms. Manning then became upset and told Ms. Carr and Ms. Barnes that she had no choice but to quit and that she was worried about ketoacidosis or a coma. She put her keys on

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<sup>81</sup> Here, the Court is summarizing the admitted statements of material fact described above.

the table, walked out, and slammed the door. Ms. Carr ran after Ms. Manning into the break room, asked her to calm down, to reconsider her resignation, and to discuss other possible accommodations. Instead, Ms. Manning told Ms. Carr that she was getting what she wanted from a long time ago; Ms. Manning cleaned out her locker and left Kohl's.

A few days after Ms. Manning resigned, Ms. Carr spoke with Ms. Manning on the telephone and asked her to reconsider her resignation and to consider other possible accommodations, including full-time and part-time employment. Ms. Manning asked Ms. Carr about her work schedule and Ms. Carr said that they would have to consult Kohl's corporate office to discuss her continued employment or possible accommodations. After this conversation, Ms. Manning did not contact anyone at Kohl's to discuss her continued employment or possible accommodations and sometime in April 2010, Kohl's terminated her employment due to her voluntary resignation.

Even though the EEOC insists that "there can be no real dispute that Manning cooperated with Kohl's and attempted to engage in an interactive process," *Pl.'s Opp'n* at 23, it is difficult to understand how a reasonable jury could conclude that she did so. It is true that Ms. Manning cooperated with Kohl's up to the time that Kohl's declined to schedule her on the day shift. But to be effective, the interactive process requires that the employer and employee engage in a "meaningful dialogue" in an effort "to find the best means of accommodating that disability." *Tobin v. Liberty Mut. Ins. Co.*, 433 F.3d 100, 108 (1st Cir. 2005). Where

a breakdown has occurred, the First Circuit has directed the courts to “look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary.” *Enica v. Principi*, 544 F.3d 328, 339 (1st Cir. 2008) (quoting *Beck*, 75 F.3d at 1135). Thus a party who “obstructs or delays the interactive process is not acting in good faith.” *Id.*

The record reflects that Kohl’s was anxious to continue discussions with Ms. Manning about whether it could make changes in her schedule that would satisfactorily accommodate her disability. Here, the EEOC argues and the Court agrees that Dr. Brodsky’s note was not a demand limited to specific hours. Instead, the doctor referred to a “more predictable and regular schedule,” avoiding “working [a] late shift one day and returning for an early shift the next day.” PSAMF ¶ 14; DSMF ¶ 51. Dr. Brodsky himself offered to “provide additional information that would be helpful to [Kohl’s].” DSMF ¶ 51.

The EEOC regulation states that the reason for the interactive process requirement is “[t]o determine the appropriate reasonable accommodation” and the process contemplates that the parties will “identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.” 29 C.F.R. § 1630.2(o)(3). Here, this process was not entered into because Ms. Manning literally slammed the door on it. If the doctor’s note did not propose specific hours, what were the limits that he would have imposed on Ms. Manning’s work schedule? Was the doctor absolutely prohibiting any night shifts or

was the problem a lack of predictability in shifts? For example, if Kohl's offered Ms. Manning a more predictable schedule that included some evening shifts, would the doctor have approved? Was the root of the stress the difficulty of working a close followed by an opening? Kohl's offered to avoid such scheduling. Would the doctor have approved? What were the stressors, other than shift changes, that were exacerbating Ms. Manning's blood sugar? Could Kohl's have addressed those stressors? If the doctor had become more involved in discussions with Ms. Manning and Kohl's, would a satisfactory accommodation have been reached? Would part-time employment, as suggested by Kohl's, have been an option? Once a better understanding of Ms. Manning's disability and of Kohl's range of flexibility was reached, would the parties have arrived at an agreed-upon accommodation? In the Court's view, the answers to these questions are not a matter of record, not because Kohl's was unwilling to engage in this process, but because Ms. Manning was unwilling to do so. In short, once Ms. Manning bolted from Kohl's, Kohl's could not interact with itself; it required Ms. Manning's good faith participation in the process and again, even viewing the facts in the light most favorable to the EEOC, Ms. Manning simply failed to engage in good faith in the interactive process contemplated by EEOC regulations.

Therefore, "ADA liability simply does not follow" with respect to the EEOC's failure to accommodate claim. *Phelps*, 251 F.3d at 28 (quoting *Beck*, 75 F.3d at 1137). The Court grants summary judgment on that claim.

## 2. Constructive Discharge<sup>82</sup>

Alleging constructive discharge presents a “special wrinkle” that amounts to an additional prima facie element in an employment discrimination case. *Landrau-Romero v. Banco-Popular de Puerto Rico*, 212 F.3d 607, 613 (1st Cir. 2000) (citation omitted). A plaintiff who seeks to withstand summary judgment on a claim of constructive discharge must point to evidence in the record showing that, as a result of discrimination, her “working conditions were so difficult or unpleasant that a reasonable person in her shoes would have felt compelled to resign.” *Ahern v. Shinseki*, 629 F.3d 49, 59 (1st Cir. 2010) (quoting *Marrero v. Goya of Puerto Rico, Inc.*, 304 F.3d 7, 28 (1st Cir. 2002)). The standard is objective—it cannot be triggered solely by the employee’s subjective beliefs, no matter how sincerely held. *Marrero*, 304 F.3d at 28.

Kohl’s asserts that the focus must be on whether “the conduct that Manning complains of . . . was [ ] sufficiently severe or pervasive to alter the terms of her employment or to create an abusive working environment.” *Def.’s Mot.* at 20; see *Def.’s Reply* at 13 n.18. Kohl’s analogizes this case to *Alvarado v. Donahoe*, 687 F.3d 453, 461-62 (1st Cir. 2012), to support its argument that the constructive discharge claim must fail, asserting that if the “callous and objectionable” comments made to the plaintiff about his psychiatric condition in *Alvarado* did “not rise to the

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<sup>82</sup> Since summary judgment is appropriate on the EEOC’s underlying failure to accommodate claim based upon Ms. Manning’s failure to engage in the interactive process, summary judgment must follow on the constructive discharge claim. See *Alvarado v. Donahoe*, 687 F. 3d 453, 465 (1st Cir. 2012) (concluding, after first rejecting the employee’s hostile work environment claim, that “[i]t necessarily follows that [the employee] has similarly failed to establish that a reasonable person in similar circumstances would have been compelled to resign”). However, because there is a separate and independent legal ground upon which the constructive discharge claim fails, the Court addresses that issue in this section.

level of unlawful harassment, then the conduct that Manning complains about certainly does not meet that threshold.” *Def.’s Mot.* at 20.

The EEOC’s claim against Kohl’s fails on the question of constructive discharge. Constructive discharge cases more typically arise from hostile work environments. *See, e.g., Alvarado*, 687 F.3d at 461-62; *Ahern*, 629 F.3d at 59 (“Absent some showing that gender-based discrimination polluted the workplace, the plaintiffs’ constructive discharge claim must fail”); *Marrero*, 304 F.3d at 14-15. For example, in *Marrero v. Goya of Puerto Rico, Inc.*, a supervisor subjected a female employee to continual sexual harassment throughout her tenure, including sexual comments, lascivious looks, offensive gestures, and bumping into her in the hallway. 304 F.3d at 14. After the employee confronted her supervisor about his behavior, her complaint was ignored and she was punished by being assigned extra work and in other ways, ultimately causing her to suffer a nervous breakdown. *Id.* at 14-15. Here, there is no claim that Ms. Manning was subjected to a hostile work environment. *Pl.’s Opp’n* at 25 (“Contrary to Kohl’s argument, the reasonableness of a resignation decision is not limited to the existence of a pervasive and ongoing hostile environment”).

It is true, as the EEOC maintains, that it is not absolutely necessary for an employee to be subjected to a hostile work environment to be constructively discharged. *See Willingham v. Town of Stonington*, 847 F. Supp. 2d 164, 189-91 (D. Me. 2012). Still, “in order for a resignation to constitute a constructive discharge, it effectively must be void of choice or free will.” *Torrech-Hernandez v. Gen. Elec.*, 519

F.3d 41, 50 (1st Cir. 2008); *see Vega v. Kodak Caribbean, Ltd.*, 3 F.3d 476, 480 (1st Cir. 1993) (constructive discharge exists where employer’s actions “effectively vitiate the employees’ power to choose work over retirement”). As part of the showing of constructive discharge, the employee “is obliged ‘not to assume the worst, and not to jump to conclusions too fast.’” *Id.* at 52 (quoting *Agnew v. BASF Corp.*, 286 F.3d 307, 310 (6th Cir. 2002) (quoting *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11th Cir. 1987))). In other words, “[a]n employee who quits without giving [her] employer a reasonable chance to work out a problem has not been constructively discharged.” *Yearous v. Niobrara Cnty. Mem’l Hosp.*, 128 F.3d 1351, 1357 (10th Cir. 1997) (quoting *Tidwell v. Meyer’s Bakeries, Inc.*, 93 F.3d 490, 494 (8th Cir.1996)).

Here, after Ms. Carr, the Store Manager, informed Ms. Manning that Kohl’s required her to work a variety of shifts, she had a moment of pique and told Kohl’s that it was giving her “no choice but to quit.” DSMF ¶ 61. Ms. Manning said she was concerned that if she continued working her current schedule at Kohl’s, she would either go into ketoacidosis or a coma, and she put her store keys on the table, walked out of Ms. Carr’s office and slammed the door. *Id.* After Ms. Manning marched out, Ms. Carr ran after her, found her in the break room, and asked Ms. Manning what she could do. DSMF ¶ 62. Ms. Carr wanted to find out whether Ms. Manning was okay, and wanted her to calm down, reconsider her resignation, and discuss other potential accommodations. *Id.* But Ms. Manning refused to discuss potential accommodations and instead she told Ms. Carr that she was getting what

she wanted from a long time ago. *Id.* Ms. Manning cleaned out her locker, left the building, and has never returned to work for Kohl's. *Id.*

Although constructive discharge is usually a fact-intensive inquiry, *Willingham*, 847 F. Supp. 2d at 191 (citing *Stremple v. Nicholson*, 289 F. App'x 571, 574 (3d Cir. 2009)), even viewing the evidence in the light most favorable to Ms. Manning, the Court is unable to conclude that a reasonable jury could find that Ms. Manning's actions were "void of choice or free will." *Torrech-Hernandez*, 519 F.3d at 50. In order to avoid a charge of constructive discharge, employers are not required to chase after employees who have resigned, and beg them to talk to them about reasonable accommodations. *Torrech-Hernandez*, 519 F.3d at 52; *Yearous*, 128 F.3d at 1357; *see also Cooper-Schut v. Visteon Auto. Sys.*, 361 F.3d 421, 428 (7th Cir. 2004) ("[A]bsent extraordinary conditions, a complaining employee is expected to remain on the job while seeking redress"). But this is what happened here. The uncontroverted facts establish that Ms. Manning got angry and quit, and then refused to reconsider or discuss potential accommodations. On these facts, even when viewed in the light most favorable to the EEOC, the Court cannot find that a reasonable person in Ms. Manning's position would have resigned, would have cast a deaf ear to her employer's importuning, and would have left her employer never to return.

The EEOC has not generated a genuine dispute of material fact on its constructive discharge claim, and the Court grants summary judgment on that claim.

#### IV. CONCLUSION

The Court GRANTS the Defendant's Motion for Summary Judgment (ECF No. 71).

#### V. SEALING OF THIS DECISION

The Court directs the Clerk of Court to seal this Order when docketed. The parties shall notify the Court no later than noon on January 15, 2014 whether this decision contains any confidential information that should remain sealed, and, if so, indicate explicitly what language should be redacted with due regard to the public's interest in access to court proceedings. If counsel take the position that certain portions of the Order must be sealed, they should anticipate that the Court will order them to justify their position against public disclosure with relevant case law. If the Court does not hear from counsel by noon on January 15, 2014, the Order will be unsealed in its entirety.

SO ORDERED.

/s/ John A. Woodcock, Jr.  
JOHN A. WOODCOCK, JR.  
CHIEF UNITED STATES DISTRICT JUDGE

Dated this 8th day of January, 2014

#### **Plaintiff**

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